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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 451

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

ALLENTOWN BROADCASTING CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 16, 1954
CERTIORARI GRANTED JANUARY 10, 1955

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,957

ALLENTOWN BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

Notice of Appeal from a Decision and Order of the Federal Communications Commission and Statement of Reasons Therefor

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I.

NOTICE OF APPEAL.

Allentown Broadcasting Corporation, Appellant in the above captioned case, hereby gives notice of its appeal from the Federal Communications Commission to the United States Court of Appeals for the District of Columbia Circuit, of a decision and Order of the Federal Communications Commission, public notice of which was given July 2, 1953, and of a Memorandum Opinion and Order on

Petition for Rehearing, publicly announced August 19, 1953, by which decision and denial of rehearing, the application of Allentown Broadcasting Corporation for a construction permit was denied and that of a competing applicant, Easton Publishing Company, was granted; said decision of July 2, 1953, and denial of rehearing Order of August 19, 1953, collectively are referred to herein as "FCC decision."

Allentown Broadcasting Corporation also gives notice of its appeal from each of the following described intermediate agency actions or rulings associated with the aforesaid final FCC decision, i.e.:

1. Memorandum Opinion and Order, released February 20, 1950, denying its Motion and Stipulation, denying its Petition for Supplemental Findings, setting aside the original decision of June 23, 1947, granting its application, and designating its application for further hearing.

2. Memorandum Opinion and Order, released May 24, 1950, denying, in part, Allentown Broadcasting Corporation's Petition for leave to amend its application.

3. Order, released July 28, 1950, denying Allentown Broadcasting Corporation's Petition for Supplemental Clarifying Order or for Reconsideration.

4. Memorandum Opinion and Order, released October 6, 1950, *In re WKAP, Inc.*, Docket No. 9132, denying Allentown Broadcasting Corporation's Petition for Rehearing or Reconsideration.

5. Action of January 31, 1952, in issuing a telegraphic authorization modifying Allentown Broadcasting Corporation's radio station license of February 2, 1949, and failing, from February 1, 1952 to date, to act upon Allentown Broadcasting Corporation's application for renewal of radio broadcasting station license, filed October 30, 1951.

6. Memorandum Opinion and Order, released July 21, 1953, requiring Allentown Broadcasting Corporation to dis-

continue operation of its station WHOL at 12:00 Midnight, August 31, 1953.

7. Undisclosed action or ruling depriving Allentown Broadcasting Corporation of performance of case adjudication functions and services by the statutory "review staff" of the FCC and of receiving undisclosed papers pertaining to this case from FCC staff personnel or offices other than the statutory "review staff."

8. Action and ruling of July 29, 1953, in denying and refusing Allentown Broadcasting Corporation's letter request of July 24, 1953, for right of inspection or copies of said undisclosed papers pertaining to this case but not filed in the record of this proceeding.

9. Action of the Commission on or about July 20, 1953, in issuing and delivering to Easton Publishing Company a permit authorizing construction of a station and commencement of radiation upon the radio frequency licensed to Allentown Broadcasting Corporation, and the failure of the Commission to vacate and recall such construction permit pending a final decision in this case.

Wherefore, Appellant, pursuant to Sec. 402, sub-pars. (b) and (c), of the Communications Act of 1934, as amended by Sec. 14 of the Communications Act Amendments, 1952, approved July 16, 1952, c. 879, 66 Stat. 718, U. S. C. Title 47, Sec. 402(b), including sub-pars. (1), (2), (5) and (6) thereof, and Sec. 10 of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 243, U. S. C. Title 5, Sec. 1009, including sub-par. (c) thereof, gives notice of its appeal to the United States Court of Appeals for the District of Columbia Circuit, as to the aforesaid FCC decision and the intermediate agency actions or rulings hereinabove described.

II.

Nature of the Proceeding.

Since the filing, on August 1, 1953, of a previous Notice of Appeal in this matter by Allentown Broadcasting Corpo-

ration (referred to herein as "Allentown Company"), No. 11,897, the FCC, during the pendancy of that Appeal, acted upon Allentown Company's Petition for Rehearing, filed July 31, 1953, and denied the same by a Memorandum Opinion and Order of August 19, 1953.

This is a second hearing proceeding before the FCC following the decision and judgment of this Court, and under its remand for further proceeding in the case of *Easton Publishing Company* v. *FCC*, 85 U. S. App. D. C. 33, 175 F. 2d 344, and the further decision of this Court on petitions for intermediate relief, *Easton Publishing Company* v. *FCC*, 85 U. S. App. D. C. 344, 185 F. 2d 987.

Following the second hearing in this case before the Commission, held over Appellant's objections, an initial decision was entered proposing a grant of the application of the Allentown Company, consistent with the Commission's origial determination of the case on June 23, 1947. Upon review of the initial decision by the FCC, it entered a decision in the case with two Commissioners not participating and one Commissioner dissenting, reversing the initial decesion of the Hearing Officer and ordering a denial of the Allentown Company's application and the grant of a rival application of Easton Publishing Company (referred to herein as "Easton Company").

Under the construction permit issued upon the original decision in the case and following the denial of petitions for rehearing of that decision, Allentown Company, pursuant to it, completed construction of its station WHOL and placed it in operation September 3, 1948, and this station has since been continuously in operation.

The construction permit was superseded by the issuance, on February 2, 1949, and delivery of a regular radio station license to Allentown Company. This was an unconditional license for the full term ending February 1, 1952. This license authorization was continued in effect by the timely filing, on October 30, 1951, of an application for renewal of license, which application is still pending before the Commission.

On January 31, 1952, the Commission, pursuant to an Order issued in the construction permit rehearing proceeding, issued to Allentown Company a further instrument of authorization in the following terms:

> "Authority under which Station WHOL is presently operating is continued until August 1, 1954, or until final decision in the consolidated hearing on the applications of Allentown Broadcasting Corporation (Docket 7180) and of Easton Publishing Company (Docket 7179) for construction permits, whichever is sooner. This authority is subject to the condition that it is without prejudice to any action that may be taken or any decision rendered in said consolidated hearing."

On July 31, 1953, within the time specified under Sec. 405 of the Communications Act of 1934, as modified by the Communications Act Amendments, 1952, U. S. C. Title 47 Sec. 405, Allentown Company filed a Petition for Rehearing. This Petition was denied by a Memorandum Opinion and Order, public notice of which was given August 19, 1953. Previously on July 10, 1953, Allentown Company petitioned for a stay and other relief of the Commission's decision of July 2, 1953, to assure continued operation of station WHOL pending review proceedings by petition for rehearing or appeal. The Commission's action on this petition resulted in an Order requiring discontinuance of station WHOL's operation at Midnight on August 31, 1953. On August 27, 1953, pursuant to Order of this Court, the FCC issued a further authorization to Allentown Company permitting the continued operation of its station WHOL until 12:00 Midnight EST of the 30th day subsequent to the final decision of the Court in this case.

III.

Statement of Reasons for Appeal.

The FCC's decision (of July 2, 1953 and of August 19, 1953) is erroneous and contrary to law, lacking in statutory due process, arbitrary and capricious, and is contrary to

public interest, convenience or necessity, for each of the following separate, independent and alternative reasons:

1. The FCC's decision does not comply with the terms of the remand for further proceeding of this case and is contrary thereto in the following particulars:

A. It disregards the original decision in this case and the affirmance thereof on appeal as to all points at issue other than findings on the matter of comparative needs of the communities and relative abilities of the applicants under the terms of the remand.

B. It fails to set forth proper or adequate findings, ultimate findings or conclusions, under the terms of the remand, as to comparative needs of the communities and the relative abilities of the applicants, and is lacking in findings or rational conclusions addressed to the matters under remand justifying a conclusion and result in the second hearing exactly opposite to that reached in the first hearing.

C. It exceeds the limits of agency action authorized under a limited remand for further findings or permissible discretion in a reopened proceeding by subjecting Allentown Company to a new trial of the case between the same parties on all of the issues; denying it the right to a submission of the case for a decision upon the joint petition of all of the parties applicant in the case; and subjecting Allentown Company to gross and undue delay of more than three years (total delay of some eight years), needless involvement and expense, transcending the bounds of permissible agency action upon such remand proceeding, and infringing upon its rights to a fair and timely determination of the case.

D. Or if such permissible reopening of the case empowered the Commission to involuntarily subject Allentown Company to a new trial, the Commission erred in denying it leave to amend its application as to matters

and transactions which transpired prior to the second hearing Order.

2. The FCC's decision is contrary to law and in violation of essential requirements of statutory due process in basing its denial of the Allentown Company's application upon actions taken during the hearing process upon its application, of making nonhearing grants of other radio stations to the city of Allentown, which junior grants are cited against the Allentown Company as the controlling reason for denial of its application, taken in conjunction with the FCC's refusal to accord Allentown Company notice of, standing to protest, or any opportunity for comparative hearing against such junior grants, or of making such grants without prejudice to action upon Allentown Company's application. Or, if grants of other radio broadcasting facilities, made during the hearing process upon an application, may be cited against it, the FCC's decision is in error in failing and refusing to consider and give effect to a grant, on December 17, 1952, of a television broadcasting station to the Easton community and to the Easton Company.

3. The FCC's decision is in error in failing to follow and is reversing the findings and conclusions of the initial decision of the Commission's Hearing Officer as to the following:

A. Lack of candor and credibility of the Easton Company's principal witnesses, and

B. Basic facts and ultimate findings as to comparative needs of the communities and the relative abilities of the applicants, and the conclusions upon comparative criteria favorable to the Allentown Company.

4. The FCC's decision fails to contain adequate or proper findings of basic facts or ultimate findings, or logical or lawful conclusions, on the matter of comparative needs of the two communities or the relative abilities of the two applicants, in the following particulars:

A. Basic findings as to radio services of other radio stations in the community, given in terms of program classification percentages, are insufficient and inadequate to establish program content, character, quality or scheduling of such other radio services, and do not warrant or support the ultimate radio services, and do not warrant or support the ultimate findings or conclusions favorable to Easton on the issue of needs or comparative needs of it and Allentown.

B. The conclusion that the authorization of two AM radio stations in Easton, in preference to the authorization of more than two AM radio stations in Allentown, is the "one decisive factor" of the decision, is without warrant in fact or in law, disregards the consideration of comparative abilities and relevant comparative criteria, and is not supported by Sec. 307(b) of the Act, and is contrary to relevant considerations for public interest, conveniences or necessity.

C. The Commission failed and refused to make findings and conclusions on relevant comparative criteria. *i.e.*, integration of ownership and management, character and quality of program proposals, and comparative reliability and ability to carry out such proposals, concentration of ownership and control of mass media of communications, public acceptance and support of proposed services, relative needs of proposed services in terms of existing services, and compliance with engineering standards.

5. The rights of Allentown Company, as the holder of a regular radio station license, granted without protest February 2, 1949, were violated contrary to lawful provisions and procedures, by FCC failure and refusal, within an unreasonable period of time, to consider and act upon Allentown Company's application for renewal of license, filed October 30, 1951, and still pending; issuance on January 31, 1952, of a telegraphic authorization modifying

Allentown Company's license; action of July 31, 1953, ordering Allentown Company's station to discontinue operation August 31, 1953; and, indirectly modifying Allentown Company's license by action of July 30, 1953, by issuing and delivering to Easton Company a construction permit for the radio frequency assignment authorized and outstanding to the Allentown Company.

6. The FCC's decision was arrived at in disregard of statutory provisions governing the handling of cases of adjudication, internal separation of functions in case adjudication matters, and with sanction and approval of injudicious and improper conduct unwarrantedly preferential to Easton Company and prejudicial to the Allentown Company, in the following particulars:

A. Receiving and considering papers or memoranda from the FCC General Counsel's office, not made a part of record in the proceeding or available to counsel, and refusing to disclose the contents thereof to the Allentown Company upon written request.

B. Allowing and condoning FCC staff personnel, engaged in performance of investigating, prosecuting or litigation functions, to usurp and circumvent the performance of functions required to be performed by and reserved to the statutory review staff.

C Condoning and approving prejudicial and injudicious misconduct of staff counsel within the Broadcast Bureau, by the literal and nearly complete adoption of its 160 exceptions to the Hearing Officer's initial decision, which were replete with slurs and charges against the Commission's Hearing Officer, completely and totally partisan in behalf of the Easton Company, and which successfully importuned a majority of the Commission that this is a "simple case to decide" solely by reason of the junior grants to Allentown, not in keeping with conduct permissible of public counsel in a proceeding upon rival applications.

7. The Commission's Memorandum Opinion and Order of August 19, 1953, denying Appellant's Petition for Rehearing during the pendency of Appeal No. 11,897, is erroneous as to each and every conclusion set forth in pars. 2 to 9 inclusiv. thereof.

WHEREFORE, the Appellant prays that an Order be entered reversing said decisions and Orders of the Federal Communications Commission and granting Appellant such other relief as this Court may determine just and proper in the premises.

Respectfully submitted,

DONALD C. BEELAR,
800 World Center Building.
Washington 6, D. C.,
Attorney for Appellant,
Allentown Broadcasting Corporation.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,897

ALLENTOWN BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

Notice of Appeal from a Decision and Order of the Federal Communications Commission and Statement of Reasons Therefor

I.

NOTICE OF APPEAL.

Allentown Broadcasting Corporation, appellant in the above captioned case, hereby gives notice of its appeal from the Federal Communications Commission to the United

States Court of Appeals for the District of Columbia Circuit, of a decision and Order of the Federal Communications Commission, public notice of which was first given July 2, 1953, by which the application of Allentown Broadcasting Corporation for a construction permit was denied and that of a competing applicant, Easton Publishing Company, was granted.

Allentown Broadcasting Corporation also gives notice of its appeal from the Commission's action of February 20, 1950, ordering a second hearing in this proceeding, and to each and every intermediate agency action or ruling entered in this proceeding as identified in the Statement of Reasons for Appeal herein.

Allentown Broadcasting Corporation also gives notice of its appeal from the Commission's Order of October 6, 1950, entered in the matter of WKAP, Inc., Docket No. 9132, denying appellant to be heard in opposition to the grant of junior applications for additional AM broadcast facilities in Allentown.

Attention of the Court is invited to the fact that Allentown Broadcasting Corporation, on July 31, 1953, within 30 days from July 2, 1952, the date of public notice of the Commission's decision and Order in this case, filed, pursuant to Sec. 15 of the Communications Act Amendments, 1952, Act of July 16, 1952, c. 879, 66 Stat. 720, U. S. C. Title 47, Sec. 405, a Petition for Rehearing. As of this date, said Petition for Rehearing is pending before the Commission.

Wherefore, appellant, pursuant to the provisions of Sec. 14(b), (c), of said Act, Act of July 16, 1952, c. 879, 66 Stat. 718, U. S. C. Title 47, Sec. 402, and Sec. 10 of the Administrative Procedure Act of July 11, 1946, c. 324, 60 Stat. 243, U. S. C. Title 5, Sec. 1009, gives notice of its appeal to the United States Court of Appeals for the District of Columbia Circuit.

II.

Nature of the Proceeding.

This proceeding is that which was held before the Commission following the decision and judgment of the Court, and its remand for further proceeding in the case of *Easton Publishing Company* v. *FCC*, 85 U. S. App. D. C. 33, 175 F. 2d 344, and the further decision of this Court on petitions for intermediate relief, *Easton Publishing Company* v. *FCC*, 85 U. S. App. D. C. 344, 185 F. 2d 987.

Following the second hearing held in this case before the Commission, an initial decision was entered proposing a grant of the application of Alletown Broadcasting Corporation, consistent with the Commission's original determination of the case in June, 1947. Upon review of the initial decision before the Commission, a Commission decision in the case was released, in which two Commissioners did not participate and one Commissioner dissented, ordering a grant of the Easton Publishing Company's application and denying that of Allentown Broadcasting Corporation.

Under the construction permit issued upon the original decision in the case and following the denial of petitions for rehearing of that decision, Allentown Broadcasting Corporation, pursuant to the construction permit issued to it, completed construction of its Station WHOL and placed it in operation September 3, 1948.

This authorization was covered by a regular radio station license to Allentown Broadcasting Corporation, February 2, 1949, and Station WHOL has since been and is now in regular operation. On January 31, 1952, the Commission issued to Allentown Broadcasting Corporation a further instrument of authorization in the following terms:

> "Authority under which Station WHOL is presently operating is continued until August 1, 1954, or until final decision in the consolidated hearing on the applications of Allentown Braoadcasting Corporation

(Docket 7180) and of Easton Publishing Company (Docket 7179) for construction permits, whichever is sooner. This authority is subject to the condition that it is without prejudice to any action that may be taken or any decision rendered in said consolidated hearing."

On July 31, 1953, within the time specified under Sec. 405 of the Communications Act of 1934 as modified by the Communications Act Amendments, 1952, U. S. C. Title 47, Sec. 405, Allentown Broadcasting Corporation filed a Petition for Rehearing. Although appellant considers that its Petition for Rehearing was timely filed before the Commission, due to some degree of uncertainty as to interpretation of Sec. 19 of said Communications Act Amendments as applied to this case, Allentown Broadcasting Corporation filed its appeal.

III.

Statement of Reasons for Appeal.

The Commission's decision of July 3, 1953, is erroneous and contrary to law, lacking in statutory due process, is arbitrary and capricious and is contrary to the public interest, convenience and necessity for each of the following separate, independent and alternative reasons:

1. This proceeding before the Commission, being one upon an application fer a construction permit (under Sec. 319 of the Communications Act), became moot as of February 2, 1949, when the Commission, under Sec. 309 of the Communications Act, made a determination and entered an action, publicly announced, granting a regular radio station license to Allentown Broadcasting Corporation, which determination and action, not contested within 20 days from the date thereof, became final and conclusive upon the parties and the Commission, and the Order of February 20, 1950, setting aside the 1947 decision granting a construction permit was not operative to revoke or modify the license granted, issued and delivered pursuant to the final action of February 2, 1949, and no valid or proper Order or

action has been entered or taken in this or any other proceeding lawfully revoking, modifying or setting aside said license.

2. The Commission erroneously and unwarrantedly reversed the findings and conclusion of the Commission's Hearing Officer in this case as set forth in the initial decision, that the President of Easton Publishing Company in several instances and matters, and its General Manager with respect to certain program proposals, were lacking in candor and credibility in their testimony in this case.

3. The Commission's procedure in this case is highly prejudicial and irregular by reason of its literal and nearly complete adoption of the Broadcast Bureau's approximately 160 exceptions, the 71 pages of which were replete with slurs and charges against the Hearing Officer, were completely and totally partisan in behalf of Easton Publishing Company, not one syllable of which was favorable or neutral as to Allentown Broadcasting Corporation, which exceptions successfully importuned the Commission that this is a "simple case to decide", the Commission without question ratifying and adopting the injudicious conduct of the Broadcast Bureau.

4. The Commission in reaching its decision of July 2, 1953, received papers not of record in the case and has denied appellant access to such papers, presumed to be memoranda, summaries or opinions of the General Counsel's office, contrary to the general provisions of the Administrative Procedure Act and to the express provision of Sec. 409(c)(3), of the Communications Act as amended by the Act of July 16, 1952, and which together with the Broadcast Bureau's conduct in becoming an advocate for the Easton Publishing Company, constituted an interference in an adjudicatory determination contrary to statute, and operated to circumvent the due performance of the functions and duties vested by law in the statutory review

staff of the Commission, established by said Act of July 16, 1952.

5. The Commission's decision of July 2, 1953 is erroneous and arbitrary because based on improper and inadequate basic findings, improper and inadequate ultimate findings of fact, and the absence of proper conclusions, in essential particulars as follows:

A. Said decision contains findings based upon discredited testimony by reason of the Presiding Officer's determination that such testimony was lacking in credibility.

B. Said decision contains findings upon services and facilities of three junior grants of licenses to stations in Allentown, and cite and rely upon such junior grants as reasons for denying appellant's application.

C. The Commission improperly considered junior grants in reaching its decision and failed to allow appellant to oppose said grants or be given consideration on a comparative basis with such grants.

D. The Commission's findings in the matter of other radio services in Allentown are improper, inconclusive, and without any probative effect and cannot support any ultimate findings or conclusions.

6. The Commissioner's decision fails to contain proper and adequate findings on relative matters of comparative differences between the two applicants necessary and essential to a proper conclusion upon the case. If adequate and proper findings were made upon comparative criteria in this case, they would warrant and require a decision favorable to appellant. Proper findings demonstrating the dominance of the Easton Publishing Company of the mass media of communications in Easton and upon the lack of reliability of its testimony, considered separately and in the aggregate with all other factors, would compel a denial of the Easton Publishing Company's application.

7. The Commission's decision is erroneous in its conclusion that a second station in a town as against more than two stations in a city, is the controlling factor overriding any other factors, or even a consideration of such other comparative factors, such conclusion not being a proper application or interpretation of Sec. 307(b) of the Communications Act; is further erroneously premised on an interpretation that this section of the Act is applicable only in interference cases which, under the Commission's own interpretation in this and other respects, is incapable of being formed into a rule of law.

8. The Commission's decision erroneously evades the decision and judgment of the Court governing the further proceeding in this case, and fails to set forth proper and adequate findings of fact setting forth what basic findings and ultimate findings it relies upon under the mandate to support and warrant a reversal of its original decision.

9. The Commission's decision is contrary to law insofar as it is predicated upon the Commission's second hearing Order of February 20, 1950 in this case, which is erroneous and contrary to due process in the following respects:

A. It erroneously denied the motion and stipulation filed June 23, 1949, by all of the parties in this case.

B. It erroneously denied petitions filed by all of the parties in the case, including Allentown Broadcasting Corporation, filed July 15, 1949, for supplemental findings upon the record as carried forward by the aforesaid stipulation.

C. The Commission erroneously refused to render a final decision on the original record as supplemented by the aforesaid stipulation and petitions for supplemental findings.

D. The said second hearing Order erroneously deprived appellant of an essential incident to the right of a hearing, *i.e.*, an agency determination upon the

record made in such hearing as submitted by the parties for final decision, and without gross and undue delay, involvement or expense and interminable proceedings.

E. It erroneously set aside the original decision in this case, which this Court upon review had *affirmed* except as to a factual issue to be decided after the remand.

F. The second hearing was a new trial on all of the original issues rather than a further proceeding required by the judgment of this Court, and was therefore not in conformance with the decision and judgment and was contrary thereto.

G. Even assuming second hearing Order of February 20, 1950, was valid, the Commission's Order of May 24, 1950, erroneously denied appellant's right to amend its application for the purposes of the second hearing proceeding with respect to preceding transactions, proposals and events, such refusal not being warranted by any rule or regulation of the Commission, and being in open conflict with the Commission's said second hearing Order and its interim Order of March 13, 1950.

H. The Commission's Order of July 28, 1950, in denying appellant's petition of June 13, 1950, for a supplemental and clarifying order and for reconsideration in the matters therein stated including the denial of leave to amend its application, and this reservation of all rights with respect to the second hearing Order proceedings was erroneous and contrary to due procedural rights obtained in any such second hearing.

10. The Commission's Order of July 31, 1953, granting appellant until 12:00 Midnight EDST on August 31, 1953, to continue operation is erroneous and without authority in law insofar as it presumes to terminate Station WHOL's

operation under its outstanding license, and constitutes an arbitrary and capricious action or threatened action, or failure to exercise due statutory discretion under the special circumstances of this case, and the Commission's action in issuing and delivering to Easton Publishing Company a construction permit on or about July 20, 1953, which on its face is an effective instrument of authorization permitting the grantee to complete construction and at its election to radiate, is an unlawful, unwarranted, and premature action and not predicated upon a final effective determination in this case.

WHEREFORE, the appellant prays that an order be entered reversing said decisions and orders of the Federal Communications Commission and granting appellant such other relief as this court may determine just and proper in the premises.

Respectfully submitted,

DONALD C. BEELAR,
800 World Center Building.
Washington 6, D. C.,
Attorney for Appellant,
Allentown Broadcasting Corporation.

1767 **Decision.**

By the Commission (Commissioners Walker and Webster not participating):

PRELIMINARY STATEMENT.

1. This proceeding arose upon the applications for construction permits indicated above. Two of the applicants, Allentown Broadcasting Corporation and Steel City Broadcasting Company of Bethlehem, Pennsylvania, Inc., are applying for new AM broadcasting stations in Allentown, Pennsylvania, on 1230 kc, 250 watts power, unlimited time. A third applicant, Easton Publishing Company, seeks to construct a new standard broadcast station in Easton,

Pennsylvania, which would also operate on 1230 kc, 250 watts power, unlimited time. The fourth applicant, Associated Broadcasters, Inc., licensee of Station WEST in Easton, Pennsylvania, operating on 1400 kc, 250 watts power, unlimited time, seeks to change that station's frequency to 1230 kc. These applications were consolidated for hearing, which was held on May 8, 9, 10, 14 and 15, 1946,
1768 at Washington, D. C. WCAU Broadcasting Company, Philadelphia, Pennsylvania, participated as an intervener in the proceeding. Exceptions to this Proposed Decision were filed by Easton Publishing Company and Steel City Broadcasting Company of Bethlehem, Pennsylvania, Inc., and oral argument was held thereon on June 13, 1947.

Findings of Fact.

The Communities and Services Involved.

2. Easton and Allentown, Pennsylvania, are only 14 miles apart. Easton is primarily a manufacturing and industrial city, with a population of 33,589. There are 96 industrial establishments in the city or its immediate vicinity, employing 26,100 persons with an annual payroll of over 40 million dollars; it has about 70 wholesale establishments with annual sales approximating 9 million dollars. The city has one full-time radio station, WEST, for which one of the applicants in this proceeding seeks a change in frequency.

3. Allentown has a population of 96,904. It has 194 wholesale establishments with total annual sales of $35,820,000. At the time of the hearing, Allentown had only one radio station, WSAN, operating on 1470 kc, 250 watts power, unlimited.[1] Allentown does not receive service from any out-of-town stations.

[1] A construction permit has been granted to increase the power of WSAN to 5 kw with directional antenna and an additional station has been authorized to operate in Allentown on 1580 kc, with 1 kw power, daytime only. A daytime only station has also been authorized for Bethlehem, on 1100 kc, 250 watts power. The latter two stations are now in operation.

4. The new station proposed for Easton by the Easton Publishing Company would serve an area of almost 1,200 square miles within its daytime normally protected 0.5 mv/m contour; a population of 171,000 lives within this area. At night the 4 mv/m normally protected contour embraces an area of approximately 164 square miles in which a population of 69,914 resides. Easton now receives full-time primary service from one local station, WEST, and during daytime hours, it receives additional service from a New York City station.[1a] The rule areas to be served under the operation proposed by Easton Publishing Company now receive service from two Philadelphia and four New York City stations.

* * * * * * * * * *

6. Each of the two new stations at Allentown proposed respectively by Allentown Broadcasting Company and Steel City Broadcasting Company would serve approximately the same populations and areas. Averaging the applicants' estimates of coverage, the stations would render a daytime service within the 0.5 mv/m contour over an area of 479 square miles to a population of 212,374. The nighttime normally protected (4.0 mv/m) contours embraces an area of 62.3 square miles in which resides a population of 134,762. The City of Allentown receives full-time primary service from Station WSAN, located there. (Since the hearing in this case it has begun to receive daytime primary service from a new station in Allentown and one in Bethlehem.) The populations in the rural areas of the proposed Allentown operations receive service from two Philadelphia and four New York City stations, and from Station WEST in Easton.

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[1a] Measurements of signal strengths in Easton prior to the hearing showed that Easton received primary service from Stations WOR and WJZ in New York City. However, when the measurements were submitted at the hearing they were qualified by an estimate that WJZ would no longer render primary service because of a change in the location of its antenna.

11. Applicant proposes a service consisting of 50% commercial and 50% sustaining programs. A breakdown of its proposed program schedule, by type of program, shows the following: General entertainment, 50%; educational, 5%; religious, 3%; agricultural, 7%; news, 15%; sports, 5%; fraternal and miscellaneous public service, 10%; and special features, 5%. A further breakdown by source of program indicates the following percentages: Network commercial, 15%; network sustaining, 48%; recorded sustaining, 21%; wire sustaining, 4%, and live sustaining, 12%. Applicant has made tentative arrangements for an affiliation with the Mutual Broadcasting System. Approximately 345 commercial spot announcements per week are anciticipated; and such time as may be necessary will be made available for sustaining spot announcements. Applicant now holds a conditional grant for an FM station in Easton and proposes a complete duplication of service on its proposed AM and FM stations. Members of its newspaper staff will be used for the collection and presentation of local news programs, which are to be supplemented with a national wire news service. Special feature programs of local interest, such as sports and society news, will also be presented by members of the staff of its newspaper. Applicant proposes to make time available by means of forum-type programs for the discussion of controversial issues. Broadcasts by candidates for political office will be on a commercial basis. Applicant has organized a citizens' advisory committee to assist it in developing a well-rounded program service adapted to the needs and desires of the community.

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15. Station WEST is an affiliate of the National Broadcasting Company and about 70% of its broadcast time is devoted to net work programs. A breakdown of its program during a typical week in April 1946 shows the following: Network commercial, 45.6%; network sustaining, 16.1%; recorded commercial, 16.5%; recorded sustaining,

3.1%; wire commercial, 5.8%; wire sustaining, 5.0%; live commercial, 2.4%; and live sustaining, 5.5%. There were 327 commercial spot announcements and 3 public service announcements broadcast during this week. About 70% of the total broadcast time is on a commercial basis and 30% is on a sustaining basis. A typical program schedule was submitted which shows the following breakdown by types of programs: entertainment, 66.7%; educational, 6.6%; religious, 7.1%; agricultural, 1.0%; news, 14.7%; and civic, 3.9%. Applicant has no established policy with respect to the number of commercial spot announcements to be carried in a single program, nor does it have any fixed policy relative to the availability of time for discussions of public controversial issues. In both fields, as in the broader field of general selection of programs, the station manager is, as a matter of practice, virtually autonomous; although he is subject to control by applicant's stockholders and directors, no instance of any difference of opinion between the manager and the directors on program matters could be recalled by the witnesses. No change in the existing program balance or program policies of Station WEST is contemplated if the application of Associated Broadcasters, Inc., should be granted.

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20. Applicant proposes a service consisting of 66% commercial and 34% sustaining programs. Tentative agreements have been made for national wire news service and for local news coverage. Applicant submitted a proposed typical program schedule which shows the following breakdown by types of program: General entertainment, 46.2%; news, 9.8%; educational (including public discussion), 22.5%; religious, 5.6%; civic and fraternal, 6.7%; agricultural, 3.4%; and special events, 5.7%. These programs will be divided among the different categories as follows: Recorded commercial, 40.84%; recorded sustaining, 7.14%; wire commercial, 10.27%; wire sustaining, 0.59%; live commercial, 15.11% and live sustaining, 26.05%. Approxi-

mately 300 to 350 commercial spot announcements per week are anticipated; no estimate of the number of public service announcements contemplated was given. Applicant has discussed network affiliation with both American Broadcasting Company and Mutual Broadcasting System. Should such affiliation be secured, applicant proposes to reduce the number of recorded programs in order to make time available for net work programs. Applicant contemplates ultimately building an FM station. It proposes to make time available without charge to local religious groups, to foster the development of local talent, and to encourage the discussion of controversial issues by furnishing time without charge for the presentation of all points of view. Sufficient time will be made available at regular commercial rates for broadcasts by candidates for political office.

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CONCLUSIONS.

1. The Easton Publishing Company and Associated Broadcasters, Inc., request the same facilities in Easton, Pennsylvania; Allentown Broadcasting Company and Steel City Broadcasting Company each requests identical facilities in Allentown, Pennsylvania, only 14 miles away. Under these circumstances, simultaneous operation by any two of the applicants, as proposed, would create mutually destructive interference and, accordingly, only one of the applications can be granted.

2. In making a selection as among the applicants, consideration must be given to the comparative need of Easton and Allentown for radio service. Under Section 307(b), we are required to exercise our licensing authority so as to "provide a fair, efficient and equitable distribution of radio service" to the various communities. The population of Allentown is about three times the size of Easton, and the scale of its commercial activities is at least three times as great as in Easton. Together with the contiguous community of Bethlehem, Allentown is about five times as large as

Easton. Easton has one full-time station, WEST;
1779 Allentown now has one full-time station, WSAN,
and one daytime only station has been placed in operation since the time of the hearing herein. Upon consideration of the size of the two cities, the existing facilities of each and the amount of radio service available to each, we conclude that Allentown is in greater need of another radio station than Easton; that its need for another radio station is greater than Easton's need for extended services from its existing station, WEST; and that the purposes of Section 307(b) of the Communications Act would be better served by a grant to one of the Allentown applicants than by a grant to either of the Easton applicants.

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4. For the foregoing reasons, we conclude that a grant of the application of Allentown Broadcasting Corporation is better calculated to serve public interest than a grant of any of the other three applications herein. Allentown Broadcasting Corporation is legally, financially, technically,
and otherwise qualified to construct and operate the
1780 station is proposes.

5. It is therefore ordered this 14th day of June, 1947, that the application of Allentown Broadcasting Company be, and it is granted. It is further ordered that the applications of Easton Publishing Company, Associated Broadcasters, Inc., and Steel City Broadcasting Company of Bethlehem, Pennsylvania, Inc., be and they are denied. The grant of the application of Allentown Broadcasting Corporation is subject to the condition that within sixty days from date of grant an application for modification of permit will be filed specifying an antenna system and transmitter site which will meet the requirements of the Commission's Standards of Good Engineering Practice.

FEDERAL COMMUNICATIONS COMMISSION
T. J. SLOWIE
Secretary.

Released: June 23, 1947

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1927 **Regular Broadcast Station Construction Permit Issued to Allentown Broadcasting Corp., Dated June 8, 1948**

File No. B2-P-4374

Call letters WHOL

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

REGULAR BROADCAST STATION CONSTRUCTION PERMIT AND MODIFICATION

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore or hereafter made thereunder, and further subject to the conditions set forth in this permit, authority is hereby granted to Allentown Broadcasting Corporation to construct a radio transmitting station located and described as follows:

1. Location of transmitter: State Pennsylvania County Lehigh City or town Allentown Street and number Corner of Colorado and Poplar Streets N. Latitude: Degrees 40, minutes 35, seconds 32 W. Longitude: Degrees 75, minutes 28, seconds 42.

2. Location of main studio: State Pennsylvania County Lehigh City or town Allentown Street and number Corner of Colorado and Poplar Streets.

3. Description of transmitting apparatus:

WESTERN ELECTRIC, Type 411-A1. Broadcasting Transmitter. Direct Crystal Control. Last radio stage: six 50-watt vacuum tubes for low level modulation. Maximum rated carrier power output 250 watts.

Antenna: 200' (205' overall height) self-supporting, series fed vertical radiator. Ground system consists of 120 radials 200' long of buried copper wire.

Tower to be painted and lighted in accordance with the attached specifications.

Power to be determined by the direct method (Sec. 3.51)

1928 4. The frequency, operating power, and hours of operation will be as follows:

(*a*) Frequency 1230 kilocycles.
(*b*) Power (1) Night 250 watts.
(2) Day 250 watts.
(*c*) Hours of operation Unlimited time.

5. Date of required commencement of construction By August 8, 1948.

6. Date of required completion of construction February 8, 1949.

7. (*a*) Upon the completion of construction in exact accord with this permit, and provided the Commission and the Inspector of Radio are notified six days in advance, the permittee is authorized—

(1) To conduct equipment tests between 1 a. m. and 6 a. m., local standard time, for a period not to exceed 10 days, on the frequency and with the power herein specified.

(*b*) Upon the completion of equipment tests, and provided an application for radio broadcasting station license has been filed with the Commission, showing the transmitter to be in satisfactory operating condition; and provided further, that the Commission and Inspector of Radio are notified two days in advance, the permittee is authorized—

(1) To conduct broadcast program tests for a period not to exceed 30 days, on the frequency, with the power, and during the hours of operation herein specified.

(*c*) The authority herein contained to conduct tests shall not be construed as a radio broadcasting station license, but to make tests incident and necessary to proper construc-

tion of the station, and the Commission reserves the right to cancel or modify such authority.

8. This permit shall be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under permittee's control.

Dated this 8th day of June, 1948.

By direction of the Federal Communications Commission,

T. J. SLOWIE
Secretary

(Seal)

1930 **Radio Broadcasting Station License Issued to Allentown Broadcasting Corp., Dated February 2, 1949**

File No. BL-3349

Official No. 2200

Call letters WHOL

UNTED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
RADIO BROADCASTING STATION LICENSE

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, an dall regulations heretofor or hereafter made by this Commission, and further subject to conditions set forth in this license, the LICENSEE ALLENTOWN BROADCASTING CORPORATION is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning February 2, 1949, and ending February 1, 1952.

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 1230 kc.

2. With power of 250 watts, with an additional xxx watts from local sunrise to local sunset only. Antenna current 2.35 amperes for 250 watts; xxx amperes for xxx watts. Antenna resistance 45 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters WHOL.

5. With the main studio of the station located at: 1125 Colorado Avenue, Allentown, Pennsylvania.

The apparatus hereinabove authorized to be used and operated is located at: 1125 Colorado Avenue, Allentown, Pennsylvania. Lat. 40° 35′ 32″ North. Long. 75° 28′ 42″ West and is described as follows: WESTERN ELECTRIC, Type 451-A1, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: six 50-watt vacuum tubes for low level modulation. Maximum rated carrier power output 250 watts. Antenna: 200′ (208′ overall height) self supporting, series fed radiator. Ground system consists of 120 radials 200′ long of buried copper wire.

Tower painted and lighted in accordance with attached specifications.

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has eben designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the terms of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transfered in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 2nd day of February, 1949.

By direction of the Federal Communications Commission,

T. J. SLOWIE
Secretary.

(Seal)

abt

1932

Minute #10-S-49
Secretary

February 4, 1949

Excerpt from Minutes of the Federal Communications Commission

The Commission (by its Secretary, pursuant to Section 0.141-0.147 of the Commission's Statement of Delegations of Authority) granted the following authorizations on the dates shown below:

BROADCAST MATTERS:

FEBRUARY 2, 1949

BL-3349	Allentown Broadcasting Corporation, Allentown, Pennsylvania	WHOL

License to cover Construction Permit (B2-P-4374, as modified) which authorized a new standard broadcast station.

T. J. SLOWIE,
Secretary.

1901 **Excerpt from FCC Public Notice of February 8, 1949**

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

PUBLIC NOTICE 32054

February 8, 1949

Report No. 1432—BROADCAST ACTIONS

The Commission, by the Secretary, took the following actions on the dates shown:

Actins taken February 2

WHOL Allentown Broadcasting Corporation, Allentown, Pennsylvania

Granted license for new standard broadcast station; 1230 kc, 250 watts, Unlt'd time. (BL-3349).

9 June 24, 1949

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of EASTON PUBLISHING COMPANY, Easton, Pennsylvania — Docket No. 7179

ALLENTOWN BROADCASTING CORPORATION, Allentown, Pennsylvania — Docket No. 7180

ASSOCIATED BROADCASTERS, INC. (WEST), Easton, Pennsylvania. For Construction Permits. — Docket No. 7441

Motion and Stipulation.

The above described parties severally move that the Stipulation set forth below be accepted by the Commission and made a part of the record in the proceeding on the above-stated applications.

STIPULATION.

In order to bring forward, as of this date, changes which have taken place since the date of hearing in the above proceeding before the Commission, with respect to the corporate structures, stockholders, officers, and related matters of each of the above-described applicants, they each hereby stipulate and agree that in the further proceeding on this matter, pursuant to the Decision and Judgment entered by the United States Court of Appeals for the District of Columbia Circuit on May 4, 1949, No. 9829, the facts herein stated as to such matters may be considered by the Commission as true and correct.

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11 IV.

It is further stipulated and agreed by and between the parties hereto that the above-described changes do not result in any modification of the policies and services as proposed to the Commission, or any change in the legal qualifications of or the position taken by each of these parties in the above-described proceeding, and that for the purposes of such further proceeding before the Commission, the original application of each party so concerned, may be deemed to be amended to confrm to the facts as set forth in this stipulation.

EASTON PUBLISHING COMPANY
By ELIOT C. LOVETT

ALLENTOWN BROADCASTING CORPORATION
By DONALD C. BEELAR

ASSOCIATED BROADCASTERS, INC. (WEST)
By ——?——

June 23, 1949.

* * * * * * * * * *

1933 **Petition for Supplemental Findings**

Allentown Broadcasting Corporation, the above-described applicant, by its attorneys, herewith requests the Commission, in its further proceeding upon the above-entitled matter in conformity with the Decision and Judgment entered by the United States Court of Appeals for the District of Columbia Circuit on May 4, 1949, No. 9829, to make additional findings substantially as set forth herein.

1. *Further Proceedings.* This case is remanded to the Commission for findings upon the comparative needs of Allentown and of Easton for new radio service and the relative ability of Allentown Broadcasting Corporation on one hand, and of either Easton Publishing Company or Associated Broadcasters, Inc. on the other, to serve the greater need. Except as to this issue, the Commission's Decision entered June 14, 1947 granting the application of Allentown Broadcasting Corporation was affirmed. The concluding paragraph in the Court's opinion states:

> "The case must be remanded for findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need. *Upon the other points at issue, the conclusions of the Commission are affirmed.*" (Emphasis added).

1934 The Commission, accordingly, has reexamined the record made in the above-entitled proceeding, held May 8, 9, 10, 14 and 15, 1946, and upon a reconsideration of the testimony and exhibits in this case makes the following additional findings and conclusions to supplement the Commission's original Decision entered June 14, 1947 and its Memorandum Opinion and Order on Petition for Rehearing entered March 25, 1948.

2. *The Parties.* Before taking up the question at issue the Commission takes note of a Stipulation filed by the above-named parties covered by their Motion dated June

23, 1949 which, for the purposes of this further proceeding, is granted. The record made in this consolidated hearing before the Commission was closed in May 1946. During the period intervening between that date and the present time, certain changes have taken place as to which the Commission takes notice.

Steel City Broadcasting Company of Allentown, Pennsylvania, Docket No. 7181, which was the fourth applicant in the original proceeding, has abandoned its application and need not be considered a party to this further proceeding. The remaining applicants are, therefore, as set forth above. *WCAU Broadcasting Company*, of Philadelphia, Pennsylvania, was an intervenor in the original proceeding. This party did not file exceptions to the Proposed Decision or thereafter participate in the case before the Commission or on appeal.

With respect to *Allentown Broadcasting Corporation* (hereinafter referred to as "Allentown") it appears from the Stipulation aforesaid that Louis Windmuller is President, Director and General Manager and principal stockholder of Allentown, that four of the five directors of Allentown are residents of Allentown, Pa., the exception being George D. Gartland of Johnstown, Pa., who is a Vice-President and Director. At the time of the original proceeding the control of Allentown was held by Louis Windmuller. Subsequently, pursuant to application dated November 26, 1948 which was granted by the Commission on March 10, 1949, 150 shares of stock were transferred from Louis Windmuller to George D. Gartland. At the present time, therefore, control of the corporation is not vested in any one person.

With respect to *Associated Broadcasters, Inc.*, (hereinafter referred to as "WEST") there have been no material intervening changes. WEST is the licensee of the station with those call letters operating at Easton, Pa. It is and has been the position of this party that if the frequency 1230 kc. is awarded to the Easton area,

1935

it should be the grantee thereof and Station WEST's present frequency (1400 kc.) would be available for assignment to one of the other applicants. (R. 110-111).

Easton Publishing Company (hereinafter referred to as "Easton") has had a change in ownership status due principally to the decease of Chester Snyder, who at the time of the hearing was President and Director of Easton and one of its two principal stockholders. According to the Stipulation aforesaid, J. D. Stackhouse is now the President of Easton and he owns 150 shares or 1.875 per cent of the stock. Adele S. Fretz, who is Vice-President, Secretary and Director, owns nine shares of stock beneficially but holds voting rights to 3,925 shares or a total of 49.175 per cent of the stock.

With respect to the intervening changes above stated, it is stipulated between the parties to this further proceeding that such changes do not result in any modification of the policies of any applicant or of the services as originally proposed to the Commission and does not change the legal qualifications of any applicant. The general qualifications of all applicants are conceded by the parties at the present time which was also true at the time of the hearing (R. 232-3). The applications of each of the parties, therefore, may be considered in the light of the intervening changes above stated.

3. *Existing Stations.* At the time of the hearing there was one radio station each in Allentown and in Easton. Station WSAN was operating in Allentown, Pa., on 1470 kc. with power of 500 watts (later increased to 5000 watts) and was a network affiliate of National Broadcasting Company. WEST was operating in Easton, Pa. on 1400 kc. with power of 250 watts and carried network programs of Mutual Broadcasting System and of National Broadcasting Company. Accordingly, at the time the record was closed in this proceeding, there was one full-time regional station in Allentown and one full-time local station in Easton.

Just prior to the hearing in this case the Commission had granted a construction permit for a daytime only station to operate in Bethlehem, Pa. on 1100 kc. with power of 250 watts. The Bethlehem station (WGPA) was, of course, not on the air at the time of the hearing in this case and was not licensed until March 1947. It is a local daytime station assigned for service to Bethlehem. Neither applicant proposed to render primary service to all of Bethlehem.

1936 Allentown, which was granted a construction permit by the Commission's original Decision, was authorized to commence program tests September 3, 1948 and its station, WHOL, was granted a license February 2, 1949. Subsequent to the hearing in this case the Commission on May 24, 1946 granted a construction permit to WKAP, Inc. to operate on 1580 kc. daytime with a power of 1 kw., which station was covered by license issued August 29, 1947. Then on May 3, 1948 the Commission granted Valley Broadcasting Company a construction permit for a station to operate in Allentown on 790 kc. with a power of 1 kw. daytime and 500 watts night, which on May 2, 1949 was licensed as Station WAEB. The Commission takes note of these intervening circumstances merely for the purpose of bringing the record up to date, but not as matters to influence its findings or decision in this further proceeding.

On the record before the Commission, Allentown is the only applicant for a new local station at Allentown, Pa., and Easton and WEST are competing applicants for a new station at Easton (in the case of WEST it will be merely a change of frequency). The three applications, each applying for the same frequency in the same general area, are mutually exclusive. The Allentown and Easton communities, although within the same metropolitan district, are separated geographically 14 miles. A new local station if granted to either of the Easton applicants will not render primary service to Allentown and conversely grant of a station to Allentown will not render primary service to Easton.

In this further proceeding, therefore, the Commission, in connection with Allentown, may consider the present service of Station WSAN; and, in connection with Easton and WEST may consider the present service of Station WEST itself, and determine the comparative need of Allentown and of Easton for a new local station and the relative abilities of the applicants to meet the needs so determined. Statistics and data as to census and marketing are set forth in the Commission's original Decision and Memorandum Opinion and Order, and need not be further reviewed here.

4. *The City of Allentown and Existing Service.* Allentown is the county seat of Lehigh County and is the principal city in the Allentown-Bethlehem-Easton metropolitan district, which ranks fourth in the state of Pennsylvania. (Tr., R. 598; Oral Argument, R. 72). Allentown has two daily newspapers, *The Chronicle*, an evening paper with a circulation of between 25,000 and 30,000; and *The Call*, a morning paper with a circulation of 47,000 (R. 584).
1937 Allentown is served by one radio station, WSAN. No other station serves the Allentown business and residential district (R. 63). Station WSAN is affiliated with *The Call* newspaper and is an outlet of NBC network programs (R. 604).

Station WSAN did not appear as a party in this proceeding nor oppose the assignment of a new local station to Allentown. The hourly and daily schedule of Station WSAN's programs, therefore, are not in evidence in this case. However, there is substantial evidence in the record as to the character of WSAN's service. It is patently clear on this record that one radio station could not attempt to meet the broadcasting needs of the city of Allentown, particularly a regional station such as WSAN which devotes a large part of the broadcast day to network programs. For example, WSAN carried only six out of thirty local basketball games due to conflicts with network programs (R. 558 and 604-5). In some cases WSAN transcribed local events which were broadcast on a delayed basis (R. 527).

The record shows that civic organizations are not provided adequate opportunities for use of the station (*e.g.*, R. 606-7, 623 and 677). Too little opportunity is made available for the development of local talent (R. 607-8). There is like evidence of the failure or inability of WSAN to clear time for use by religious groups, studios, schools, local orchestras and others (R. 526-30, 558, 677 and 720-1). The record shows a substantial demand on the part of local business concerns for additional radio advertising (R. 590 and 627).

Accordingly, the lack of service, particularly of local broadcasting service, in the city of Allentown is convincingly established on this record. A second station devoted to the local needs of the city of Allentown would provide an outlet for additional educational, religious, civil, agricultural organizations and will provide the community a choice of program service, regional and local. This applicant, Allentown, has made detached provision for the broadcast of local sports, news events, and other local program services as summarized in detail in the Commission's original Decision. (R. 385-408 and Exbs. 31-4). The specialized training and experience of the officials and staff of this applicant, particularly of its President, as summarized in the original Decision, clearly establishes the technical and other ability of this applicant to meet the additional broadcasting service needs of the city of Allentown. In fact, the needs of the city of Allentown for service to be rendered by a local broadcasting station can be met only by this applicant, since it is now the only one which proposes to serve this community.

5. *The City of Easton and Existing Service.* The city of Easton is served by one local radio station, WEST. 1938 If this applicant is granted the assignment at issue in this case, there would be no change or additional broadcast service since it would be merely a change in the frequency assignment of existing Station WEST. In such event the frequency 1400 kc., now assigned to Station WEST, would be available for assignment either to Allen-

town or to Easton. Accordingly, the assignment of a new local station is primarily a conflict between the two applicants, Allentown and Easton, and between the city of Allentown, and the city of Easton. The existing program service being rendered by Station WEST is made a matter of record in this case (Ex. 61) and was summarized in the Commission's original Decision. The program service which Easton has proposed to the Commission is set forth in Ex. 17. Easton, similar to Station WEST, proposed to affiliate with a national network, if possible (R. 246). And its program schedule shows that it contemplates nearly 70 per cent of its time will be devoted to network programs (R. 306). There are no significant differences pointed up in the record btween the existing service renderd by Station WEST and that proposed by Easton. On th econtrary, Easton's proposal included some programs now being carried by WEST (R. 301). The record shows that no stockholder or officer of Easton has had any previous experience or training in radio broadcasting (R. 238, 242 and 263). Neither of the two principal stockholders of th Easton Publishing Co. appeared and testified in this proceeding. The present Advertising Manager of this applicant's local newspaper, *The Easton Express*, is to be General Manager of the radio station (R. 244). He too is without any previous experience in this field (R. 247 and 263). It was developed at the hearing that the program proposal of Easton was prepared by one employed on a free-lance basis for this particular purpose and that this program proposal, Ex. 17, had not been reviewed or submitted for the approval of either Easton's Board of Directors or the Citizens' Advisory Committee proposed by thi applicant (R. 289-90).

6. *Conclusions.* In the original Decision census data and commercial statistics were given controlling consideration. The Commission has now added to these facts a more detailed consideration of the evidence as to existing and proposed services and of the comparative needs of the cities and the relative abilities of the applicants.

It may be concluded from the record in this case that there is a need for a second station both in Allentown and in Easton. However, the need for one local station in Allentown, which has one regional station, is greater than the need for a second local station in Easton which has one local station. Other things being equal, each community
1939 should be given a choice of service but this is not always possible nor is it a matter of first priority. As shown by the foregoing findings, the existing service to Allentown is clearly and by concrete instances shown to be grossly inadequate and the needs of the city of Allentown are far greater than can be met by the existing station. With respect to the city of Easton the showing is more general and less definite. There is little if any choice between the existing service rendered by Station WEST and that proposed by the Easton applicant. The Commission was told that Station WEST is doing very little in local programming (R. 266). This statement is denied by Station WEST (R. 833-878, Ex. 61-2). Notwithstanding the conflicting contentions of these two applicants, neither has made out a convincing case for or against a second station in Easton. To this deficiency must be added an accumulation of circumstances, namely, the lack of any specialized experience or training on the part of any official of Easton and the failure of either of the principal stockholders to appear personally and testify in this proceeding, particularly Adele S. Fretz whose holdings and voting rights give this stockholder virtual control of the corporation. While none of these circumstances are considered to reflect upon the legal and other qualifications of this applicant, nevertheless they are factors which, when contrasted to the Allentown application, further support a choice of the latter. Testimony submitted by the stockholders of Allentown presents a more convincing showing as to the lack of existing service to the city of Allentown, the greater demand on the part of various local organizations of various categories for additional broadcasting service and the ability of Allen-

town based on its organization, policies and proposals to provide such new and additional service. Therefore, upon consideration of the difference in size of the two cities, the existing radio service available to each, and the comparative needs of each city for the new services as proposed and the abilities of each applicant to provide new service in each case, we conclude that the city of Allentown is in greater need of the proposed new radio station than is Easton and the Allentown applicant is qualified to provide that new and additional service. It is concluded, therefore, that the purposes of the act will be better served by a grant of the Allentown application.

The conclusions of the Commission as set out in its original Decision in this case and as revised in its Memorandum Opinion and Order are hereby further modified and supplemented as set forth above. For the reasons stated herein the result reached in the original Decision is affirmed.

1940 Accordingly, it is ordered that the grant of Allentown Broadcasting Corporation be and it is hereby affirmed and that the denial of the Easton Publishing Company application and of Associated Broadcasters' application in each case be and it is hereby affirmed.

Respectfully submitted,

ALLENTOWN BROADCASTING CORPORATION.

* * * * * * * * * *

13 August 5, 1949

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Petition for Adoption of Supplemental Proposed Findings.

The Easton Publishing Company petitions the Commission to adopt the findings hereinafter set forth, or findings to the same effect, in connection with the further proceedings upon the above entitled matter pursuant to the Judgment and Decision rendered on May 4, 1949, Appellate Docket No. 9829, by the United States Court of Appeals for the District of Columbia Circuit. This petition is also

in the light of a stipulation executed by the parties hereto in order to bring to date the record of the proceedings insofar as the corporate structures of the parties are concerned.

PRELIMINARY STATEMENT

The Easton Publishing Company, appellant in the appellate proceedings, urged upon the Court three contentions, two of which were rejected and one accepted as well taken. The accepted contention concerned the failure of the Commission to make adequate findings upon which to base its conclusion that Allentown was in greater need of another radio Station than was Easton. The Court held that "Present and proposed programs would seem to be an essential element in testing comparative community needs from the standpoints of both the receivers and the broadcasters", that the Commission made findings as to the program proposals but it "gave no indication of their comparative qualities, or of the lack of any particular type of service in either community or of the greater ability of either applicant to meet that need"; and that "we cannot tell why the Commission concluded that Allentown had greater need for a new station than did Easton".

14

Accordingly, the case was "remanded for findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need."

It is expected that the findings which the Commission must now necessarily make will result in the conclusion that Easton has the greater need for a new station and that the Easton Publishing Company has the greatest ability to meet that need as evidenced by its proposed programs. Therefore, it is also expected that the Commission will adopt another Proposed Decision based upon the findings made pursuant to the Court's Judgment.

* * * * * * * * * *

31 **Memorandum Opinion and Order.**

By the Commission: (Commissioners Hyde and Hennock not participating; Commissioner Jones dissenting.)

1. The Commission has before it for consideration the proceeding involving the three above applications. Steel City Broadcasting Company of Bethlehem, Pennsylvania, Inc., Allentown, Pennsylvania (Docket No. 7181), a former party to this proceeding, advised the Commission on June 29, 1949, that it no longer had any interest in this proceeding. Its application, therefore, need not be given further consideration. WCAU Broadcasting Company, Philadelphia, Pennsylvania, an intervenor, did not file exceptions to the Proposed Decision in this proceeding nor thereafter participate in this case, either before the Commission or on appeal and, therefore, it need not be further considered in this proceeding.

2. The Commission released its Decision herein on June 23, 1947, granting the application of the Allentown Broadcasting Company (3 RR 1225). Two of the unsuccessful applicants filed petitions for reconsideration which were denied by the Commission in a Memorandum Opinion and Order released on March 26, 1948 (4 RR 176). Thereafter, the Easton Publishing Company perfected its appeal to the United States Court of Appeals for the District of Columbia Circuit. The Court rendered its decision on May 4, 1949, and remanded the case to the Commission for findings on the comparative needs of Easton and Allentown for additional radio service and the ability of the various applicants to meet those needs (75 F. 2nd 344 (App. D. C. 1949), (4 RR 2147)).

3. The three applicants now remaining in this proceeding filed a Motion and Stipulation on June 24, 1949, which purports to bring forward changes which have taken place with respect to the corporate structures, stockholders, officers and related matters concerning the applicants. The Allentown Broadcasting Corporation filed a petition for

supplemental findings on July 15, 1949, and the Easton Publishing Company and the Associated Broadcasters, Inc. (WEST), filed petitions for the adoption of supplemental findings on August 5, 1949, and August 18, 1949, re-
32 spectively. The parties agreed that the facts stipulated may be considered by the Commission as true. These facts consist of a list of the present officers, stockholders and directors of the Easton Publishing Company and the Allentown Broadcasting Company with the number of shares of stock held by each stockholder and the percentage such shares bear to the total shares of each company. It is also stipulated that no change in the officers, directors and stockholders has occurred in the case of Associated Broadcasters, Inc. (WEST). It was further stipulated that these changes do not result in the modification of the policies and services proposed by each of the parties or any change in their legal qualifications or the positions taken by them in this proceeding and that, for the purposes of further proceedings, the original application of each party may be deemed to be amended to conform to the facts set forth in the stipulation.

4. It appears from the Motion and Stipulation and these petitions that Chester Snyder, formerly president, a director and the owner of 46.65% of the outstanding stock of the Easton Publishing Company, is now deceased and that Anna M. Snyder and Daniel W. Snyder, strangers to this proceeding, in their individual capacities and as trustees under the will of Chester Snyder, now own the stock formerly owned by him. It is proposed to amend the application to reflect this basic change in the ownership of applicant, Easton Publishing Company; however, we are not informed as to the citizenship, the terms of the trusteeship or the other qualifications of these new stockholders.

* * * * * * * * * *

33 6. Upon consideration of the Motion and Stipulation, we are of the opinion that it must be denied.

A comparison of the applications of the Easton Publishing Company and the Allentown Broadcasting Corporation, assuming that the amendments requested in the Motion and Stipulation were permitted, with the evidence in this proceeding, and the interim ownership reports of Allentown Broadcasting Corporation, shows the applications and the record to be at such material variance that we cannot determine whether the public interest, convenience or necessity would be served by a grant of either of them without further proceedings. This result would not be changed even if we were to make the supplemental findings of fact requested in the petitions. The stipulations does not give us information upon which we could conclude that either of these two applicants is legally qualified to become a licensee in view of the substantial changes in the ownership of them. Because of such changes in ownership, we have no assurance that the policies proposed by either of them would be in fact the policies of the applicants as presently constituted. Furthermore, the proposed amendments to the applications are substantial in nature. We cannot agree, on the basis of the information submitted to us, that such amendments do not result in any modifications of the policies and services proposed by the applicants at the hearing or do not result in any change in the legal qualifications of or the position taken by each of the parties to this proceeding. The request in the stipulation that the applications be amended and the information therein "be considered by the Commission as true and correct" together with the requested supplemental findings in effect request a waiver of further hearing on the applications as amended. The stipulation was not accompanied by appropriate amendments to the applications as required by Sections 1.303 and 1.307 of our Rules and as indicated above, does not contain sufficient information to permit us to make the findings required with respect to the applications without a further hearing even if the amendments were filed and accepted.

34 7. In addition to the impediments to any grant at this time to the Easton Publishing Company or the Allentown Broadcasting Corporation resulting from the substantial changes in the ownership or control of those applicants subsequent to the original hearing, an examination of the hearing record reveals that it fails to contain other vital information and evidence which would be essential to the making of a grant to any of the three applicants at this time. Our examination of the petitions for supplemental findings submitted by all three of the applicants in this case reenforces us in this opinion. For, the record does not contain sufficient information upon which we can determine on a comparative basis the relative need in each of these communities for additional broadcast service, the program service presently being rendered to the areas and populations proposed to be served by each of the applicants, or the ability of the applicants as presently constituted to meet such needs. In view of this situation, we are of the opinion that the Decision in this proceeding must be set aside, the applicants be given an opportunity to file within twenty days from the release hereof such petitions as may be appropriate to seek amendment to bring their applications up to date, the record reopened, and this proceeding designated for further hearing upon the issues specified below.

8. We recognize that this has been a long proceeding and that it would be desirable to bring it to an end; however, our desire to bring this proceeding to an early conclusion is outweighed by our obligation to insure in the public interest that the allocation of the frequency here involved be made so as to provide a fair, efficient and equitable distribution of radio service to each of the communities. That, we cannot do on the basis of the record now before us. In view of the material changes relating to factors upon which the Commission must ultimately base a decision in this proceeding, particularly with respect to the corporate structures of the applicants and the services available to the

communities involved, we are of the opinion that these factors as they exist at the present time must be considered in reaching a proper decision in the public interest (FCC v. Pottsville Broadcasting Company, 309 U. S. 134 (1940)). Thus, we believe that a further hearing must be held and record made upon which findings can be based in accordance with the principles announced by the Court in remanding this case to us.

9. We further recognize that the Allentown Broadcasting Corporation is now operating its Stattion WHOL under the authority of our Decision (released June 23, 1947) which we must now set aside in order to comply with our obligation to carry out the instructions of the Court mentioned above and the provisions of the Communications Act of 1934, as amended. Normally, setting aside a Decision under which a station operates cancels its authority to operate. In view, however, of the fact that a further hearing must be held in this proceeding; that the determination of which of the three applications will ultimately be granted is yet to be made; that Allentown Broadcasting Corporation is presently rendering service as a result of having constructed its station under Commission authority though at the peril of having such authority withdrawn as a result of the appeal by the Easton Publishing Company to the U. S. Court of Appeals for the District of Columbia Circuit; and it would unnecessarily work a hardship on the Allentown Broadcasting Corporation to require it to cease operation of WHOL until a Decision is released in this proceeding either granting or denying its application; we believe that it is in the public interest to maintain the parties in the position in which they were at the time of the Court's action and stay the effectiveness of our Order setting aside the Decision (released June 23, 1947), insofar as it withdraws the authority of WHOL to operate until a final Decision is released in this proceeding.

10. It Is, Therefore, Ordered, This 16th day of February, 1950, That the Motion and Stipulation is Denied; that

the foregoing petitions for Supplemental Findings are DENIED; that the Decision herein (released June 23, 1947) is SET ASIDE; that the parties to the proceeding may file such petitions as may be appropriate to seek amendment to bring their applications up to date within twenty days from the release hereof; and that this proceeding is DESIGNATED FOR FURTHER HEARING at a time and place to be specified by subsequent order of the Commission on the following issues:

1. To determine the technical, legal, financial and other qualifications of the applicants, their officers, directors and stockholders, to construct and operate the stations proposed by them, except the legal qualifications of Associated Broadcasters, Inc.

2. To determine the areas and populations which would gain or lose primary service through the operation of these proposed stations and the character of other broadcast services available to these areas and populations.

3. To determine the type and character of program service now being rendered to the areas and populations to be served and the type and character of programs service proposed to be rendered by the applicants and whether such proposed service would meet the requirements of the populations and areas proposed to be served.

4. To determine on a comparative basis which of the two communities has the greatest need for the radio service which would become available by the assignment of the frequency involved in this proceeding.

5. To determine on a comparative basis the relative ability of Allentown Broadcasting Corporation on the one hand, or Easton Publishing Company or Associated Broadcasters, Inc. (WEST), on the other, to meet the greater need so determined.

6. To determine whether the operations of the proposed stations would involve objectionable interference with existing or pertinent proposed broadcast stations and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other broadcast service to such areas and populations.

36 7. To determine whether the installations and operations of the proposed stations would be in compliance with the Commission's Rules and Standards of Good Engineering Practice Concerning Standard Broadcast Stations.

8. To determine on a comparative basis which, if any, of the applications in this proceeding should be granted.

11. It Is Further Ordered, That the effectiveness of the above Order setting aside the Decision insofar as it withdraws the authority of the Allentown Broadcasting Corporation to operate Station WHOL is Stayed pending the further hearing in this proceeding and the release of a final Decision herein.

Federal Communications Commission *

T. J. Slowie
Secretary

(Seal)

* Commissioner Jones dissenting as shown on #46452 attached. Released: February 20, 1950.

1457 **Letter to FCC from Eliot C. Lovett, April 12, 1950.**

COPY

Law Offices of
HANSON, LOVETT & DALE
729 Fifteenth Street, N. W.
Washington 5, D. C.

April 12, 1950

Mr. Wayne Coy, Chairman
Federal Communications Commission
Washington 25, D. C.

Dear Mr. Coy:

On March 14th I wrote the Commission requesting advice (1) as to whether the Allentown Broadcasting Corporation, Docket No. 7180, is now to be characterized merely as an applicant, or as a permittee or licensee, under the Commission's Memorandum Opinion and Order adopted February 16th, and (2) as to whether Station WHOL is operating as a duly licensed station, or under a special service authorization, or under some authority not delineated in the Rules, in which latter case an explanation of the present nature of authority was requested.

To date I have received no answer to my letter, although a prompt response was requested.

Your cooperation to the end that a reply will be forthcoming to my letter of March 14th will be appreciated.

Respectfully,

ELIOT C. LOVETT /s/
Attorney for
Easton Publishing Company

1467 **Letter to Eliot C. Lovett from FCC, April 20, 1950.**

April 20, 1950

Eliot C. Lovett, Esq.
Law Offices of Hanson, Lovett & Dale
729 Fifteenth Street, N. W.
Washington 5, D. C.

Dear Mr. Lovett:

This is with further reference to your letters of March 14 and April 12, 1950, inquiring about the status of Station WHOL and the Allentown Broadcasting Corporation.

Your letter of March 14 refers to the Commission's Memorandum Opinion and Order released on February 20, 1950 in Docket #7179, et al. The Commission's Memorandum Opinion and Order of February 20 sets aside its previous decision of June 23, 1947 which had granted the application of the Allentown Broadcasting Corporation. However, the Commission's Opinion further ordered that the effectiveness of the Order setting aside its previous decision of June 23, 1947, insofar as it withdrew the authority of the Allentown Broadcasting Corporation to operate Station WHOL, was stayed pending further hearing in this proceeding.

Your letter requests information as to the nature of the authority under which Station WHOL is operating. Station WHOL is operating under a license granted in accordance with the Commission's previous decision of June 23, 1947. While that decision was set aside by the Commission's Order of February 20, 1950, the effectiveness of the withdrawal of Allentown Broadcasting Corporation's authority to operate Station WHOL was stayed. Accordingly, the operation of Station WHOL is authorized pursuant to the license previously granted pending further hearing and a final decision in the proceeding presently before the Commission in this matter.

Your letter also makes reference to the Commission's Order of March 13, 1950, dismissing the application of the

Allentown Broadcasting Corporation for transfer of control. As you know, the dismissal of that application was without prejudice to the filing of an amendment by the Allentown Broadcasting Corporation to its pending application for a construction permit, and this disposition was made in the light of the Memorandum Opinion and Order of February 20, 1950, setting aside the decision of June 23, 1947.

1468 Since the Allentown Broadcasting Corporation has filed a petition for leave to amend its application which you have opposed on behalf of the Easton Publishing Company, and this matter will be heard tomorrow before the Motions Commissioner, you will have an opportunity to be heard at that time with respect to your position in this matter.

Very truly yours,

T. J. SLOWIE
Secretary

MJM:m/lit:L

Delivered to Mr. Lovett by hand April 20, 1950.

44 April 11, 1950

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

File No. BP-4212
Docket No. 7179

In re Application of EASTON PUBLISHING COMPANY, Easton, Pennsylvania. For Construction Permit.

Motion for Leave to Amend.

The Easton Publishing Company, while not admitting the propriety of the Commission's Order of February 16, 1950, ordering a further hearing upon the above-entitled application and inviting an amendment to bring it up to date, moves to file a corrective amendment to show a redistribution of 3,732 shares (46.65%) of the common stock because of the death, in 1947, of the owner, Chester Snyder, and the distribution of his holdings to his widow and one son, one-

third each, and to them as trustees of the remaining one-third for the benefit of another son. The amendment also reflects changes in the officers and directors due to the death of Mr. Snyder, who was President and a Director.

The Commission was formally notified of these corporate changes by means of reports filed by the applicant as permittee of FM Station WEEX, Easton, Pennsylvania. On June 17, 1948, with full knowledge of these changes, the Commission granted the applicant a license (BLH-192) covering the operation of Station WEEX.

The sole purpose of the amendment, which is being submitted simultaneously with this Motion, is to comply with the Commission's Order that an amendment be filed to bring up to date the abov-entitled application by April 11, 1950. By so filing, the Easton Publishing Company does not waive its right, but instead specifically reserves the right, to question the propriety of the Order.

Respectfully submitted,

EASTON PUBLISHING COMPANY
By ELIOT C. LOVETT
Its Attorney
729 Fifteenth Street, N. W.
Washington 5, D. C.

1916 **Wire to WHOL from FCC. January 31, 1952.**

JANUARY 31, 1952

ALLENTOWN BROADCASTING CORPORATION
RADIO STATION WHOL
1125 COLORADO AVENUE
ALLENTOWN, PENNSYLVANIA

AUTHORITY UNDER WHICH STATION WHOL IS PRESENTLY OPERATING IS CONTINUED UNTIL AUGUST 1, 1954, OR UNTIL FINAL DECISION IN THE CONSOLIDATED HEARING ON THE APPLICATIONS OF ALLENTOWN BROADCASTING CORPORATION (DOCKET 7180) AND OF EASTON PUBLISHING COMPANY (DOCKET 7179) FOR CONSTRUCTION PERMITS, WHICHEVER IS SOONER. THIS AUTHORITY IS SUBJECT TO THE CONDITION THAT IT IS WITHOUT PREJUDICE TO ANY ACTION THAT MAY BE TAKEN OR ANY DECISION RENDERED IN THE SAID CONSOLIDATED HEARING.

T. J. SLOWIE, SECRETARY
FEDERAL COMMUNICATIONS COMMISSION

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76849 FCC 52D-19

In re Applications of EASTON PUBLISHING COMPANY, Easton, Pennsylvania	Docket No. 7179 File No. BP-4212
ALLENTOWN BROADCASTING CORPORATION, Allentown, Pennsylvania. For Construction Permits	Docket No. 7180 File No. BP-4374

APPEARANCES

ELIOT C. LOVETT and WILLIAM K. VAN ALLEN, on behalf of Easton Publishing Company; REED T. ROLLO, CHARLES T. HELWIG, E. C. JOHNSTON and R. RUSSELL EAGAN, on behalf of Allentown Broadcasting Corporation; PAUL A. PORTER, on behalf of Eastern Radio Corporation (WHUM), Reading, Pennsylvania; J. P. BLUME, SOL SCHILDHAUSE and MAX D. PAGLIN, on behalf of the Commission.

Initial Decision

PRELIMINARY STATEMENT.

1. This is a consolidated proceeding which originally involved four mutually exclusive applications for authority to construct and operate standard broadcast stations on 1230 kc, with 250 watts power, unlimited time, in two cities in eastern Pennsylvania. The original applicants were:

(a) Easton Publishing Company,[1] seeking authorization for a new station at Easton (Docket No. 7179); (b) Associated Broadcasters, Inc. seeking authorization to change the facilities of Station WEST at Easton (Docket No. 7441); (c) Allentown Broadcasting Corporation,[2] seeking authorization for a new station at Allentown (Docket No. 7180);

[1] Sometimes hereinafter referred to as "Easton."

[2] Sometimes hereinafter referred to as "Allentown."

and (d) Steel City Broadcasting Company of Bethlehem, Pennsylvania, Inc., seeking authorization for a new station at Allentown (Docket No. 7181). Only the applications of Easton Publishing Company and Allentown Broadcasting Corporation now remain for consideration.

913 HISTORY OF PROCEEDING.

2. This has been a long drawn out controversy, and it is believed that a brief chronology of events will be conducive to a better understanding of the underlying problems which must be resolved. The two applications now under consideration in this proceeding have been the subject of extended hearings before this Commission and three appeals to the United States Court of Appeals for the District of Columbia Circuit. The hearings before the Commission have been in two parts (1) the original hearing in 1946 and (2) the further hearing in 1951. The combined record of the hearings in both years is now before us and the evidence therein is the basis of this decision. The first hearing was prior to the enactment of the Administrative Procedure Act, and the Commission did not then maintain a separate staff of hearing officers but assigned attorneys on its legal staff to preside at individual hearings. The presiding officer at the 1946 hearing was an attorney assigned specially to preside at that hearing. The further hearing, in 1951, was before the undersigned Hearing Examiner, a member of the separate corps of Hearing Examiners appointed and serving under and pursuant to Section 11 of the Administrative Procedure Act.

3. The Commission, by an order dated January 30, 1946 and amended on March 13, 1946, designated the then pending applications requesting the facilities here under consideration for hearing in a consolidated proceeding.[3]

[3] The issues in the 1946 hearing, insofar as they relate to the applicants before us at this time, are as follows:

(1) To determine the legal, technical, financial and other qualifications of the applicants to construct and operate the proposed stations.
(2) To determine the areas and populations which may be expected to

4. The 1946 hearing on these applications was held in Washington, D. C. in May of that year and the record closed on May 15, 1946. WCAU Broadcasting Company, licensee of Station WCAU, Philadelphia, Pennsylvania, participated as an intervenor in the 1946 hearing. On
914 April 28, 1947 the Commission adopted a Proposed Decision looking toward the grant of the application of the Allentown Broadcasting Corporation and the denial of the other applications. Exceptions to the Proposed Decision were filed by the losing applicants, and oral argument thereon was heard by the Commission en banc. On June 23, 1947, the Commission released its Final Decision (3 RR 1225) in which the application of the Allentown Broadcasting Corporation was granted and the other three applications were denied. Petitions for rehearing were filed by Easton Publishing Company and Steel City Broadcasting Company of Bethlehem, Inc.; and Associated Broadcasters, Inc. filed a notice of its desire to appear and participate fully in any rehearing that might be ordered. The petitions for rehearing were denied in a Memorandum Opinion and Order released on March 26, 1948 (4 RR 176).

5. On June 8, 1948, the Commission granted the application (BMP-3052) of Allentown Broadcasting Corporation for approval of the transmitter site of Station WHOL. The station commenced operation under program tests on September 3, 1948 and on February 2, 1949, was granted

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gain primary service from the operation of the proposed stations and the character of other broadcast service available to those areas and populations.

(3) To determine the type and character of program service proposed to be rendered and whether it would meet the requirements of the areas and populations proposed to be served.

(4) To determine whether the operation of the proposed stations would involve objectionable interference with any existing or proposed broadcast facilities and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other broadcast service to such areas and populations.

(5) To determine whether the installation and operation of the proposed stations would be in compliance with the Commission's Rules and Standards of Good Engineering Practice concerning standard broadcast stations.

(6) To determine on a comparative basis which, if any, of the applications in this consolidated proceeding should be granted.

a license for a period expiring February 1, 1952. Meanwhile, an application (BTC-713) for consent to the relinquishment of the control of the Allentown Broadcasting Corporation by Lewis and Cora Windmuller, through the sale by the corporation of a block of newly authorized stock to George Gartland, had been filed. Such application was granted by the Commission on March 10, 1949.

915 6. The Easton Publishing Company had in the meantime perfected an appeal to the United States Court of Appeals for the District of Columbia Circuit from the decision of the Commission denying its application, and both the Allentown Broadcasting Corporation and Associated Broadcasters, Inc. had timely intervened in the appellate proceeding.[4] The Court of Appeals remanded the case to the Commission, on May 4, 1949, for "findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need". The opinion of the Court also stated that "upon the other points at issue, the conclusions of the Commission are affirmed." (175 F. (2d) 344). As we understand the decision of the Court of Appeals, it requires additional findings only upon the (a) comparative needs of the respective communities for new radio service from the standpoint of (1) the service presently available in each community in terms of radio programs and (2) the need for any particular type of programs to meet such needs; and (b) the relative abilities of the applicants to serve the greater need, especially with respect to composition and character of program proposals.

7. Subsequent to the remand of the case, the applicants[5] then remaining in the proceeding filed various pleadings in endeavors to obtain a final decision without further hearing, including a joint "Motion and Stipulation" filed on June

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[4] The Steel City Broadcasting Company ceased to be a party to the proceeding by failing to appeal from the Commission's denial of its petition for rehearing; and, in addition, such applicant advised the Commission on June 29, 1949 that it no longer had any interest in the proceeding.

[5] These applicants were Easton Publishing Company, Allentown Broadcasting Corporation and Associated Broadcasters, Inc. (WEST).

24, 1949, purporting to bring up to date changes which had taken place with respect to corporate structures, stockholders, officers, and related matters. In addition, the applicants individually filed petitions for supplemental findings during the months of July and August, 1949. These were denied and the action thereon embodied in a Memorandum Opinion and Order dated February 16, 1950 (6 RR 21) in which the Commission set aside its decision of June 14, 1947, reopened the record, and designated
916 the applications for further hearing upon the following issues:

(1) To determine the technical, legal, financial and other qualifications of the applicants, their officers, directors and stockholders, to construct and operate the stations proposed by them, except the legal qualifications of Associated Broadcasters, Inc.[6]

(2) To determine the areas and populations which would gain or lose primary service through the operation of these proposed stations and the character of other broadcast services available to those areas and populations.

(3) To determine the type and character of program service now being rendered to the areas and populations to be served and the type and character of program service proposed to be rendered by the applicants and whether such proposed service would meet the requirements of the populations and areas proposed to be served.

(4) To determine on a comparative basis which of the two communities has the greater need for the radio service which would become available by the assignment of the frequency involved in this proceeding.

[6] The application of Associated Broadcasters has since been dismissed and it is no longer a party.

(5) To determine on a comparative basis the relative ability of Allentown Broadcasting Corporation on the one hand, or Easton Publishing Company, or Associated Broadcasters, Inc. (WEST) [6] on the other, to meet the greater need so determined.

(6) To determine whether the operations of the proposed stations would involve objectionable interference with existing or proposed broadcast stations and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other broadcast service to such areas and populations.

(7) To determine whether the installations and operations of the proposed stations would be in compliance with the Commission's Rules and Standards of Good Engineering Practice Concerning Standard Broadcast Stations.

917 (8) To determine on a comparative basis which, if either, of the applications in this proceeding should be granted.

8. When the Commission by the order of February 16, 1950 set aside its decision of June 14, 1947, the effectiveness of the order setting aside the grant was stayed, insofar as it related to the operation of Station WHOL, pending a final decision in this proceeding. In this connection, it was recognized that Allentown Broadcasting Corporation was then, as it is now, rendering service as a result of having constructed Station WHOL under proper authority, though at the peril of having such authorization withdrawn as a consequence of the appeal by the Easton Publishing Company to the Court; that it would work an unnecessary hardship on the Allentown Broadcasting Corporation to require it to cease operation of the station until a decision is released in this proceeding, either granting or denying its application; and that it is in the public interest to maintain the parties in the position in which they were at the time

of the Court's action,[7] until a final decision is rendered herein.

(a) In view of the apparent variance between the evidence in the record of the 1946 hearing and the status of the applicants and their proposals as reflected by the information before the Commission at the time it reopened the record and set the matter for further hearing, the applicants were given twenty days in which to file "such petitions as may be appropriate to seek amendment to bring their applications up to date." Pursuant to this authorization, petitions for leave to amend were thereafter filed by both applicants, as hereinafter discussed. Both applications, as originally filed, were upon a form approved in 1944, but this application form was revised [7a] in 1948 so as to request more specific information than did the earlier form, especially with respect to proposed program service.

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918 10. The Easton Publishing Company amendment filed pursuant to the February 1950 Order related only to corporate matters, such as stock ownership, officers and directors, and reflected a transfer of 3,732 shares (46.65%) of the common stock of the corporation due to the death in 1946 of the owner, Chester Snyder, and the distribution of his holdings to his widow and one son, one-third each, and to them as trustees of the remaining one-third for the benefit of another son. The amendment also reflected changes in the officers and directors made subsequent to the death of Mr. Snyder who had been president and a director. No amendment was proferred by Easton with respect to changes in other phases of the application, such as program service, engineering, finances, or tech-

[7] At the time of the remand, Station WHOL held a license for the period ending February 1, 1952. On January 31, 1952, the Commission conditionally extended the authorization under which the station now operates until August 1, 1954, or until final decision in this proceeding, whichever is sooner; subject to the express condition that such grant is without prejudice to any action in this proceeding.

[7a] The revised form was in use on February 16, 1950 and also at the time the amendments were filed pursuant to the order of that date.

nical equipment. The Easton petition was unopposed and was granted on April 21, 1950.

11. The amendments[7b] submitted by the Allentown Broadcasting Corporation reflected certain changes already effected in the minority stock ownership of the Allentown corporation which occurred both before and after the decision of the Court of Appeals;

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919 12. In the meantime, on March 17, 1950, Easton Publishing Company filed in the United States Court of Appeals for the District of Columbia a petition for Writs of Prohibition and Mandamus directed to the Commission prohibiting the contemplated further hearing and requiring that findings as to the comparative needs of the Allentown and Easton communities for radio service and the relative abilities of the respective applicants to serve the greater need be made upon the original record; and on March 23, 1950, the Allentown Broadcasting Corporation also petitioned the Court for a Writ of Mandamus requiring the Commission to make supplemental findings of fact upon thet existing record. The Court of Appeals denied both of these petitions, on October 23, 1950, holding that "since the Commission in the exercise of its duty has concluded that the original record does not contain sufficient information for a proper determination of the issues before it, the Commission in the instant case is warranted in reopening the proceeding for the taking of additional evidence." (185 F. (2) 987)

* * * * * * * * * * *

15. The further hearing on the issues specified in the Commission's Order of February 16, 1950 was convened by the undersigned Hearing Examiner in Allentown on March 5, 1951. At the outset of the further hearing, counsel

[7b] The Allentown amendment was, in fact, an amended application which brought up to date the data requested in the old application form in use at the time both of the instant applications were originally filed and also furnished the additional data requested by the current application form.

920 for the Allentown Broadcasting Corporation made a statement in which he reserved "whatever rights" such applicant has to "object to the procedure of a further hearing" and also noted an objection to the "consideration by the Commission in arriving at a final decision in this case of any program service being rendered by the stations in the area which have been authorized by the Commission subsequent to the closing of the original record." The further hearing was in session on March 5, 6, 7 and 8 in Allentown; on March 9, 12 and 13 in Easton; on May 28 and 29 and June 21 and 28, 1951 in Washington, D. C.; and the record again closed on the last mentioned date.

16. As heretofore discussed, Easton Publishing Company did not avail itself of the opportunity afforded by the Commission to amend its application to bring its proposal up to date, except insofar as certain changes, denominated by it as "corrective", resulting from changes in stock ownership were concerned. At the further hearing in 1951, it did, however, offer evidence on phases of its application not affected by the amendment, particularly with respect to its proposed program service, which differed substantially from that shown in the application and from that which it had offered at the 1946 hearing.

* * * * * * * * * * *

921 18. Allentown and Easton, Pennsylvania lie about fourteen miles apart and both are within the Allentown-Bethlehem-Easton Metropolitan District as established by the U. S. Census for 1940, as well as within the Allentown-Bethlehem Standard Metropolitan Area as defined by the 1950 Census.[19] The Metropolitan District as fixed in 1940 is an irregularly shaped area from 335 to 340 square miles in extent with a total population at that time of 325,142. Such Metropolitan District extends into New Jersey on the east and includes, in addition to the three

[19] The 1950 Census defines the metropolitan community as the Allentown-Bethlehem Standard Metropolitan Area which encompasses all of Lehigh and Northampton Counties, Pennsylvania and Warren County, New Jersey, and has a 1950 population figure of 438,000.

principal cities, one borough in Burks County and a major part of both Lehigh and Northampton Counties in Pennsylvania, as well as a portion of Warren County in New Jersey. The city of Easton is near the eastern edge and the city of Allentown is slightly west of the center of the metropolitan area. Between 1940 and 1950, the population of the city of Allentown increased by 9,329, or approximately 9.6%; whereas, the population of Easton increased by 821, or approximately 2.4%.

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922 19. *Easton,* primarily a manufacturing and industrial city, is the county seat of Northampton County, Pennsylvania and the center of a solidly built up community. It is surrounded by four boroughs and one town, all immediately contiguous. The total population of this built-up community is 64,132, according to the 1940 U. S. Census, and 65,480 according to the Preliminary Count of the 1950 U. S. Census of Population. The city of Easton itself had a very slight increase in population between 1940 and 1950. This community includes, in addition to the city of Easton, Wilson borough with a population of 8,127 in 1940, and 8,099 in 1950; West Easton borough with a population of 1,159 in 1940, and 1,370 in 1950; and Glendon borough with a population of 552 in 1940, and 605 in 1950, all in Pennsylvania; and Phillipsburg with a population of 18,314 in 1940, and 18,889 in 1950, and Alpha borough with a population of 2,301 in 1940, and 2,107 in 1950, in New Jersey. The Easton community contains some eleven contiguous political subdivisions. Since official information is given for cities, towns and boroughs with populations of 10,000 or more and several of the subdivisions in the Easton community have a population of less than that, no such information is available for these small subdivisions.

20. Easton is a trading center for nearby portions of eastern Pennsylvania and northwestern New Jersey. According to the U. S. Business Census for 1948, the city of

Easton has a total of 609 retail establishments with an aggregate volume of sales amounting to $58,202,000; Phillipsburg has 246 retail establishments with an aggregate sales volume of $12,532,000; and Wilson borough, immediately adjacent to Easton, has a total of 82 retail establishments with an aggregate volume of $4,710,000. The three communities, therefore, have 937 retail establishments with a total volume of sales of $75,444,000. The corporate limits of Easton have not been materially changed since the city was founded in 1741 and the industrial growth, of necessity, has been beyond the corporate limits, particularly with regard to the heavy goods industries. Within the corporate limits of Easton and Phillipsburg there are a total of 76 manufacturing plants; and outside, but within the built-up Easton area, there are 43 such plants, or a total of 119 in the built-up community. The record does not disclose their exact size, but there is indication that most of them are light manufacturing plants. The rural part of the area grows dairy products, potatoes, grain and alfalfa.

21. There are about four high schools, public and parochial, in Easton, Phillipsburg and Wilson borough, as well as a number of junior high schools. Easton is the site of Lafayette College, a college for men with a student body of about 1,500 from about 40 states and about 30 foreign countries, which is an important factor in the economic and cultural life of the community

923 22. *Allentown*, the county seat of Lehigh County, Pennsylvania, has a population of 96,904, according to the 1940 U. S. Census, and 106,233 according to the Preliminary Count of the 1950 U. S. Census. It adjoins the city of Bethlehem to the east. Bethlehem, with a 1950 population of 66,027, is approximately in the center of the metropolitan district. These two cities considered as a single area have a total population of 172,260 persons, based on the 1950 Census. According to the 1948 U. S. Retail Census, Allentown has 1,516 retail stores with total sales of $142,135,000; and Bethlehem, 852 retail stores with $63,-

359,000 in sales; or a total of 2,368 stores, with sales aggregating $205,494,000, in the two cities. The industrial growth of Allentown is indicated by the fact that from 1940 through 1949 the total number of factory workers increased from 20,899 to 25,024; the total wages and salaries from $23,040,200 to $60,421,400; the value of the products from $90,091,700 to $218,562,200; and invested capital from $27,535,200 to $58,855,700. The largest single industry in the community is the Bethlehem Steel Corporation.

23. According to the Twelfth (1950) Industrial Directory prepared by the State of Pennsylvania, Lehigh County, Pennsylvania (in which Allentown and a portion of Bethlehem are located) has as its chief products motor vehicles, silk and rayon goods, cement, slaughtering and meat packing, structural iron and steel, underwear, beer, bakery products, jute and burlap, cigars, iron castings, machinery and parts, plumbers supplies and steam fittings. During 1948 it had 404 manufacturing establishments with a total value of products amounting to $308,192,600. These establishments had a total of 31,917 employees. In addition to the foregoing, there were 21 other manufacturing establishments in the area, having a total of 3,519 employees. There were 12 quarry establishments with a value of products of $1,172,600 and employing 221 workers. Agriculture is also one of the leading industries of Lehigh County with fruit and truck crops being grown. There were 2,317 farms in the county producing crops valued at $9,858,490, and livestock products, including dairy, poultry and wool, valued at $6,134,700. There were 17 banks and 8 building and loan associations, having total resources of $161,077,614 and $3,452,410, respectively, in the county.

24. Allentown is the site of Muhlenberg College and Cedar Crest College for girls. It has approximately 108 churches and religious organizations, 23 civic organizations, 35 social organizations, 25 charitable and social service organizations, 16 private schools, 31 public schools, 24 govern-

mental offices and 23 fraternal organizations. The contiguous city of Bethlehem is the site of Lehigh University, Moravian College for Women, Moravian College for Men, and Moravian Seminary.

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927 28. *J. L. Stackhouse*, president, treasurer and a director of the Easton Publishing Company, as well as its general manager, has been associated with the company for 33 years. He received his stock in the applicant from H. J. Steele (50 shares) and Chester Snyder (100 shares) as remuneration for services.

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930 33. The balance sheet of the Easton applicant, dated November 30, 1950, shows assets (including good will, $300,000 [16]) totalling $1,698,779.48, of which $699,092.79 are current assets, including $175,248.98 in cash. Current and accrued liabilities, plus reserves for bad debts, total $274,242.22. FM Station WEEX has been operated at a loss, approximately $55,000 in 1949 and $58,000 in 1950. The applicant company, however, had a net profit in excess of $50,000 per year from its over-all operation despite the loss suffered in the FM station operation. According to a statement of assets and liabilities, as of December 31, 1945, introduced in evidence at the 1946 hearing, the Easton applicant had total assets amounting to $1,106,429.20 and accounts payable amounting to $219,394.30, leaving a net worth of $887,034.90. The net worth of the company has thus increased roughly $537,000 in slightly less than five years. The record discloses that dividends were paid in 1950, as well as in other years since the 1946 hearing, the amount of these dividends is not shown and Mr. Stackhouse (the president, treasurer, director and general manager of the company) testified that he did not know either the

[16] This represents the cost of the purchase of a competing newspaper in 1926.

amount of dividends per share or the total paid in dividends for the year 1950. This seems somewhat unusual in view of the fact that he owns 150 shares in the company, attends all meetings of stockholders and directors, votes his own stock as well as proxies, has been with the company for 33 years, and otherwise showed a familiarity with the detailed operations of the company. He was, in fact, able to recall accurately the reasons stated by a competing newspaper for suspending publication in 1943, as well as the various rates of depreciation taken on physical assets of the company.

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934 36. On direct examination the president of the Easton Publishing Company testified that the Allentown and Bethlehem daily papers circulated in the Easton area as well as daily papers from Newark, New Jersey; Plainfield, New Jersey; Bangor, Pennsylvania; Philadelphia, Pennsylvania; and New York City. He also testified that several weekly newspapers circulated in the area. However, on cross-examination, he testified that the Bethlehem Globe-Times had a circulation of only 59, the Allentown Morning Call, 453, and the Allentown Evening Chronicle only 1, in the Easton area. He did not have available any circulation figures for the Newark, New Jersey; Plainfield, New Jersey; Bangor, Pennsylvania; Philadelphia, Pennsylvania; and New York City daily newspapers, and the record contains no such figures. With respect to the weekly papers, which he specifically stated on direct examination circulated in the area, when asked on cross-examination concerning the circulation figures and the distance from Easton of the towns in which they were published, he testified that he did not intend, on direct examination, to convey the impression that these weekly newspapers had any circulation in the Easton area. The witness first denied having any circulation figures on the weekly newspapers; but when the suggestion was made that they were

small papers, he testified as to their circulation in detail.[17]

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935 36(b). Mr. Stackhouse testified that the policy of the newspaper has been to mention the call letters of Station WEST whenever it "seemed pertinent to the news item which was carried." When he was requested to submit clippings from the paper showing mention of Station WEST, he produced some five clippings, one of which had to do with the application of Station WEST to experiment with the new UHF television. The four additional clippings submitted related to the March of Dimes and Community Chest campaigns and contributions. The first was dated January 14, 1950 and was the report of an organization meeting for the March of Dimes campaign listing Station WEST among many other organizations which were participating. The second one, dated February 9, 1950, was the report of the total contributions collected in the March of Dimes campaign and mentioned the amount that had been sent to Station WEST. The third was dated January 22, 1950 and was a story on the Victory Dinner marking the completion of the 1950 Community Chest. Station WEST carries display advertising in the Easton Express but the newspaper has never purchased time over the station. *Joseph H. Adleman*, the city editor of the Easton Express, produced other clippings which show mention of Station WEST on the church page of the newspaper in connection with radio talks by local ministers. He testified this is carried every Saturday and has been so carried for several years. Another clipping shows a news item relative to the weekly program of the Parent-Teachers Association

[17] The testimony of Mr. Stackhouse on such point is as follows:

Cross-examination by Mr. Rollo:

"Q. Do you have any circulation figures on the weekly newspapers you mentioned? A. No, sir.

"Q. They are all small papers, are they not? A. No, they are not all small. The Hunterdon newspaper is approximately 7,000 circulation. The Washington New Jersey Star is not a member of the ABC, but I believe its sworn statement is in the neighborhood of 5,000. The other weeklies' sworn statements are approximately in the neighborhood of 2,000."

which is broadcast regularly over Station WEST. This, too, is said to be carried regularly in the newspaper. Another clipping refers to the annual meeting of the Easton Chamber of Commerce and makes the statement that the principal speech will be broadcast over Station WEEX and rebroadcast over Station WEST.

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944 52. Station WHOL operated at a lost from the time it started operation in September 1948 to the close of that year in the amount of $15,223.64. During the year 1949, the station operated at a loss of $22,012.86. During the first six months of 1950 (it showed an operating loss of $5,321.94 and during the last six months, an operating profit of $8,469.94, or a net profit during the year 1950 of $2,548. It showed a net profit of $1,200 for the month of January 1951. Allentown Broadcasting Corporation estimates that the total revenues of Station WHOL for the year 1951 will be approximately $90,000. This estimate is based upon the fact that revenue for 1949 amounted to approximately $58,000; revenues for 1950, to approximately $76,700, or an increase of about $18,000, and normal growth is expected to produce a similar increase for the year 1951, thus bringing the total income to the hereinbefore mentioned estimate. Further support for the estimate is found in the fact that the gross income for January and February of 1951 amounted to approximately $16,500. Expenses are expected to continue in approximately the same amount as in 1951, or about $75,000 annually.

53. No additional construction will be required if the Allentown application is granted, although plans do call for the construction of a large studio in the future. The Elks Club Auditorium has been used by Station WHOL as a point of origination for some of its local dramatic programs.

945 54. Allentown Broadcasting Corporation has 13 full-time employees and a part-time bookkeeper em-

gaged in the operation of Station WHOL. Several of them, including the engineers and the station manager, have been with the station since it commenced operation. The employees of Station WHOL include in the administration department the station manager, a stenographer, a bookkeeper (part-time) and a custodian; in the program department, a traffic clerk, chief announcer, two staff announcers,, and a copy director; sales department, a commercial manager, and a salesman; and in the engineering department, a chief engineer and two other engineers. The transmitter, offices and studios are now located in the same building. There are at the present time two studios but, as hereinbefore indicated, plans have been made for adding a third studio to the building.

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957 79. Easton has one standard broadcast station: Station WEST, which operates on 1400 kc, with 250 watts power, unlimited time; and two FM broadcast stations: Station WEST-FM (operated by the licensee of Station WEST) and FM Station WEEX (operated by Easton Publishing Company, the Easton applicant in this proceeding). Allentown has three standard broadcast stations: Station WSAN which operates on 1470 kc, with 5 kw power, unlimited time; Station WAEB, which operates on 790 kc, with 500 watts power, daytime, 1 kw power, night; and Station WKAP which, at the time of the hearing, was operating daytime only on 1580 kc, with 1 kw power, but had a construction permit to change to 1329 kc, with 1 kw power, unlimited time. Allentown has one FM station, WSAN-FM (operated by the licensee of Station WSAN) and there is, in addition an outstanding construction permit for another FM station (WFMZ) in that city issued to Penn-Allen Broadcasting Company.[25] In addition, Station WGPA which operates daytime only on 1100 kc, with 250 watts

[25] The Commission's records show that this authorization, originally granted conditionally on July 11, 1946 and construction permit issued January 2, 1947, was permitted to lapse, but was reinstated on September 26, 1951, and there is now pending an application for license (BLH-778).

power is located in Bethlehem, another city in the metropolitan community. The same licensee also operates Station WGPA-FM in Bethlehem.[26] The record con-
958 tains no probative evidence as to the actual number of FM receivers in either Easton or Allentown. With respect to Easton, there is, however, evidence that while the number of FM receivers may be "slight" as compared to the number of AM receivers, the number is growing.

PROGRAMMING OF EXISTING STATIONS IN METROPOLITAN AREA.

80. Each of the three major cities in the Allentown-Bethlehem Standard Metropolitan Area[27] has available radio programs of local interest furnished by a locally situated broadcast station (both AM and FM). The extent of such service from an engineering standpoint has already been discussed in detail elsewhere in this decision. No outside station regularly broadcasts programs for the benefit of either the Easton or the Allentown communities or originates programs therefrom, although an outside station occasionally may carry from one of these communities an athletic event which involves a team from the locality of such station. Neither the stations in Allentown nor the one in Bethlehem regularly carry programs designed for or originating in the Easton community; and, conversely, the station in Easton does not regularly carry programs designed for the other communities.[28]

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[26] Applications are pending for television stations in both Easton and Allentown. Easton Publishing Company is one of the applicants for a television station in Easton.

[27] This is the designation of the metropolitan community made by the Census Bureau, in the Report of the 1950 Census.

[28] In order to ascertain most expeditiously the radio service presently available to the Allentown and Easton communities from existing stations in terms of program content, it was agreed at a pre-hearing conference that the Allentown applicant would request a subpoena for a representative of Station WEST at Easton, Pennsylvania and that counsel for the Easton applicant would request subpoenas for representatives of Stations WSAN, WAEB and WKAP at Allentown, Pennsylvania and Station WGPA at Bethlehem, Pennsylvania. In the interest of uniformity, it was agreed that the programs for the week of January 14, 1951 would be considered. Subpoenas were issued in accordance with such agreement.

LOCAL EXISTING SERVICE IN EASTON.

81. The manager of Station WEST at Easton testified at length concerning the program service of that station with particular reference to the week of January 14, 1951. The station commences its broadcast day at 6:30 a. m., Monday through Saturday, and at 7:00 a. m. on Sunday, and signs off at 12:30 a. m. daily, except for Saturday when it signs off at 1:00 a. m. It is affiliated with the networks of the National Broadcasting Company and the Mutual Broadcasting System and as an affiliate of these networks the station regularly carries many network programs, as well as programs of local origin. The policy of Station WEST, with respect to reporting events of local interest and activities of civic, religious, fraternal and educational organizations, is to cover in the fullest manner and to the greatest extent any program that it considers of public interest. Station WEST follows the practice of tape recording local civic events when the events occur at a time the station has commercial commitments and playing them back at a later time, usually in the late evening hours, unless the
959 event is of outstanding importance in which event the commercial programs are cancelled and the program carried at the actual time of occurrence.

82. During the week of January 14, 1951, the station devoted 70.39% of its time to entertainment programs, 4.76% to religions programs, 2.31% to agricultural programs, 2.18% to educational pregrams, 11.57% to news, 1.12% to discussion programs, and 7.67% to talks. It broadcast network programs 44.4%, recorded and transcribed programs 33.6%, wire programs 11%, and live programs 11% of the time. During the same week, 70.3% of the time was devoted to commercial programs; and 600 spot announcements, including 100 non-commercial spot announcements, were broadcast. The programs of this week are said to be typical of the service rendered by the station.

(a) About 85 regular news programs were produced by Station WEST during the week of January 14, 1951, totalling approximately 8 hours of broadcast time. These included news broadcasts on a daily basis at 12:15 to 12:30 p. m. and at 6:00 to 6:15 p. m.; on a Monday through Saturday basis at 6:30 to 6:35 a. m., at 7:45 to 8 a. m., at 8:55 to 9 a. m. and at 5 to 5:05 p. m.; on a Monday through Friday basis at 10:55 to 11 a. m., at 2:45 to 2:50 p. m. and at 11 to 11:07 p. m.; on a Saturday and Sunday basis at 11 to 11:15 p. m.; on Monday only at 8:55 to 9 p. m. and at 9:55 to 10 p. m.; on Friday only at 8:24 to 8:29 p. m.; on Saturday only at 1:55 to 1:59 p. m.; and on Sunday only at 7:11 to 7:16 a. m. The news is obtained by local reporters of the station and from the wires of the United Press. In addition to these regular newscasts, a program entitled "In Your Neighborhood" was broadcast on Wednesday at 5:55 to 6 p. m. which consisted of human interest stories as gathered from the wires of the United Press.

(b) Agricultural programs carried by the station during the week included a program entitled "Farmers Digest" broadcast daily, Monday through Saturday, from 6:35 to 7 a. m. and consisted of transcribed American folk music and hymns together with farm news as gathered from the wires of the United Press; releases from Penn State College, from the Agricultural Extension Service of Northampton County, Pennsylvania and Warren and Hunterdon Counties, New Jersey; poultry, egg and livestock prices from auction markets at Flemington, New Jersey and Quakertown, Pennsylvania. In addition, interviews with local farm agents, both live and tape recorded, are carried, as well as taped interviews from local farm shows and from farms in nearby counties.

960 (c) Weather information was broadcast several times a day. Forecasts were carried on an early morning show entitled "Musical Clock". (During the winter months parents and children are kept advised over this program of hazardous travel conditions due to snow and ice

and of the closing of schools in the area.) A regular weather program was broadcast Monday through Saturday from 7:40 to 7:45 a. m. on which weather conditions and forecasts were given. Another weather program entitled "Weather makes the news" was broadcast Monday through Saturday from 5:24 to 5:29 p. m. This program consisted of a weather forecast secured from the United States Weather Bureau Office at the Allentown-Bethlehem-Easton Airport and gave prevailing weather conditions and predictions. Weather conditions on the same day of the previous year were given along with the prevailing conditions and seasonal information concerning sports.

(d) Local religious programs broadcast during the week of January 14 included a 15-minute devotional period daily, Monday through Friday, and a one-minute prayer delivered at noon daily, Monday through Saturday, by different members of the Easton-Phillipsburg Ministerial Association and the Sunday morning church services which originated at a local church. The foregoing religious programs were on a sustaining basis. Several network religious programs were also broadcast by the station during the week.

(e) During the week of January 14, the Easton-Pottsville basketball games were broadcast play-by-play over WEST-FM and over Station WEST on a "recap" basis; i. e., the Sports Director, after broadcasting the game over WEST-FM at the gymnasium, returned to the studio where he recorded a play-by-play report of the game for a later broadcast over Station WEST. The Lafayette-Lehigh and the Easton High School-Allentown Central Catholic High School basketball games were also broadcast in this same manner during the week.

(f) Other local programs during the week included a 14-minute Sunday School lesson broadcast on Saturday morning; a chorus of high school children broadcast on Saturday afternoon, a 25-minute forum discussion on Monday evening, a civic awards program, and others.

83. During the month of January 1951, Station WEST carried 271 local public service programs totalling 85 hours and 17 minutes of broadcast time, some of which were taped and carried on a delayed broadcast basis. These programs included, among others, programs by or for religious groups of Easton and Phillipsburg, church services, farm information, parent-teachers associations (Easton and Phillipsburg), Girl Scouts, gubernatorial inauguration ceremonies, Chamber of Commerce, March of Dimes, weather reports, Navy, Army and National Guard, veterans, and civic clubs.

961 84. Examples of the public service activities of Station WEST include sponsorship and promotion of a drive for solicitation of funds to provide care and treatment for polio patients at the Easton Hospital during and after the severe polio epidemic in the late summer of 1949 in Easton. The station made an intensive campaign for funds for this project, advising the public to make contributions at either the hospital or the radio station, whichever was the more convenient. On October 24, 1949, Station WEST purchased space for an advertisement in the newspaper to express appreciation to the public for the generous response to the appeal. This advertisement also showed a facsimile of the check, in the amount of $21,540.04, which the station turned over to the hospital and stated that a grand total of $45,543.63 had been raised in the campaign. In January of 1950, Station WEST raised over $8,000 for the March of Dimes Campaign; in March of 1950, raised over $5,000 to establish a community baseball team; and in April 1950, raised over $1,000 for the American Cancer Society. Station WEST cooperates with the Centenary Junior College at Hackettstown, New Jersey, and broadcasts programs for it.

85. During the year 1950, Station WEST carried a total of 2,777 locally originated programs in the interests of the various local civic, religious, educational, philanthropic, fraternal and governmental organizations, amounting in

the aggregate to 701 hours and 56 minutes of broadcast time. The station also broadcast some 4,088 public service announcements for such organizations during the year. Included among these programs were such features as a direct pickup of the American Legion Parade, the annual Armistice Day Ceremonies, a talk by the South Korean Ambassador to the United States from the American Legion convention in Harrisburg soon after the outbreak of the Korean War, a broadcast of a baby parade which is a southside Easton community project, and a program in the interest of better eyesight during Better Vision Week. The station broadcast the Boy Scouts' Week annual dinner, as well as a series of programs covering Boy Scout activities; and also, on two occasions, broadcast from the Jamboree of International Boy Scouts in Valley Forge. Other locally originated public service programs include a series of children's workshop programs produced in cooperation with the Easton recreation program; addresses by the President of Temple University and a representative of the Citizens Committee for the Hoover Report, as well as several other broadcasts relating to the Citizens Committee for the Hoover Report; a number of broadcasts on behalf of the Community Chest; a series of programs for the Easton Area Junior Chamber of Commerce in the format of forum discussions of controversial issues by representatives of the Junior Chamber of Commerce, members of the
962 listening audience and an expert on the subject under discussion; the annual banquet of the Junior Chamber of Commerce of the Easton area; a series of programs for the Women's Auxiliary of the Jewish faith; commencement exercises of the Easton High School; concerts by the Easton Oratorio Society; broadcasts for the Easton Parent-Teachers Association; city, county, state and national election returns, including Northampton and Warren Counties; a 25-minute farm program broadcast each morning, Monday through Saturday, throughout the year, designed principally for farming activities in Northampton and Warren

Counties, in which the farm agents of Warren and Northampton Counties appear; a series of programs for the Girl Scouts; the Hanukah program, Temple Covenant of Peace (Jewish); a series of Veterans Administration programs; a daily program broadcast each morning, Monday through Friday, reporting activities of interest to the women listeners; a series of 40 programs produced by the National Safety Council; several programs on home economics produced in cooperation with the County Agricultural Agent of Northampton County; the annual Hospital Fund dinner; a Human Rights Day program; a program on "I Am an American Day"; programs for the Kiwanis Club; a broadcast from the Knights of Columbus convention in Easton; a series of programs by labor organizations appealing for the purchase of government bonds; the Lafayette College Alumni Parade and commencement exercises (the commencement exercises have been broadcast every year since 1938); the Lafayette College choir, which was fed to the National Broadcasting Company for a coast-to-coast broadcast; and the Lafayette Founders' Day address. Additional public service programs broadcast by Station WEST include a number of programs for the League of Women Voters in Northampton and Warren Counties; several broadcasts direct from the Pennsylvania Farm Show in Harrisburg; programs covering the activities during Pennsylvania Week; the Wilson Borough High School commencement exercises and many other programs of a similar nature; the annual dinner of the Phillipsburg Chamber of Commerce; the Phillipsburg High School commencement exercises, which also have been a regular feature of the station for a number of years; programs for the Phillipsburg National Guard; a series of programs by the Parent-Teachers Association of Phillipsburg; a band concert by the Pennsylvania Musical Education Association; a series of 44 programs broadcast by local citizens for the entertainment of "shut-ins"; 15-minute programs throughout the year of veterans' news conducted by the station's Special

Events Director and the Veterans Administration for the Easton area; an address by Admiral Lovett of the U. S. Navy under the auspices of the Veterans of Foreign Wars; the annual banquet of the Veterans of Foreign Wars at Easton; series of programs by the Commander of the Easton Post of the Veterans of Foreign Wars. Special safety announcements were made as chain breaks as often as possible during the various holiday week-ends and holidays throughout the year.

963 86. Station WEST regularly broadcasts Sunday morning church services directly from the various churches in the area on a monthly rotation basis, from 11:00 a. m. to 12:00 noon throughout the year, except during the month of July. The broadcast time for these programs is provided by the station without charge. However, the charge for the line to the church and the labor cost for the announcer and engineer are paid for by the church. These costs total about $9.75 for each broadcast. Religious programs broadcast by the station other than those mentioned above include the daily morning devotional and daily minute of prayer discussed in paragraph 82(d); a daily 15-minute, and sometimes longer, program by a colored minister who has been with the station since 1938; and a series of twelve 15-minute transcribed programs sponsored by the Catholic Church.

87. High school sports events including the Easton High School football games and most of the Phillipsburg High School night football games are broadcast on both WEST-AM and FM; the Easton High School basketball games are carried on FM only; and sporting events of all local high schools are reported on WEST-AM and FM. The station also broadcasts some of the Lafayette College football, baseball and basketball games, in whole or in part.

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964 LOCAL EXISTING SERVICE IN ALLENTOWN

89. Standard radio Stations[29] WSAN, WAEB and WKAP operate at Allentown.

STATION WSAN PROGRAMS

90. The office manager and owner of a minority interest in the licensee of Station WSAN testified with respect to the programs of that station. It commences the broadcast day at 6:00 a. m., Monday through Saturday, and at 8:30 a. m. on Sunday, and signs off at 12:05 a. m. daily, and is thus on the air a total of 124 hours and 5 minutes during the week. The station is affiliated with the network of the National Broadcasting Company and regularly obtains programs from that source for a substantial portion of the broadcast day. As a general rule, Station WSAN serves the larger merchants of the area because of its higher power and correspondingly higher rates, although some small merchants do use the station as an advertising medium.

91. The programs broadcast during the week of January 14, 1951 are said to be typical of the program service furnished by Station WSAN. During that week, the station devoted 55.08% of its broadcast time to network programs; 19.07% to recorded programs; 2.15% to wire programs and 23.70% to locally originated live programs. During the same week, 58.70% of the total broadcast time was devoted to commercial programs and 409 commercial spot announcements and 73 non-commercial spot announcements were broadcast. The station devoted 67.17% of the broadcast time during the week to entertainment programs; 5.64% to religious programs; 6.05% to agricultural programs; 1.41% to educational programs; 11.49% to news broadcasts; 3.63% to discussions and 4.61% to talks.

[29] These stations, with the exception of Station WSAN, have been licensed subsequent to the original hearing in this proceeding: Station WKAP was first licensed on August 29, 1947; and Station WAEB was first licensed on May 2, 1949.

(a) The public service programming of Station WSAN during the week of January 14, 1951, both network and local, included 12 programs, varying in length from 15 minutes to 1 hour, on Sunday; a 1-hour farm program and a 5-minute weather broadcast daily, Monday through Saturday; four programs, varying in length from 15 minutes to 1 hour, on Monday; four 15-minute and two 30-minute programs on Tuesday; five programs, varying in length from 15 minutes to 30 minutes, on Wednesday; three programs, varying in length from 5 to 15 minutes, on Thursday; four 15-minute programs on Friday; and eleven programs, varying in length from 15 minutes to 30 min-
965 utes, on Saturday. Eighteen public service organizations received non-commercial spot announcements during the week.

(b) During the week of January 14, 1951, a program entitled "Morning Devotions" was presented at 7:30 to 8:00 a. m., Monday through Saturday, under the direction of B. Bryan Musselman, owner of a majority interest in the station licensee. This is the only religious program presented on a sustaining basis. Other religious programs were broadcast during the week for the First Brethren Church and the Christ Lutheran Church, on a commercial basis. These were a 15-minute program presented at 9:00 to 9:15 on Sunday morning by the First Brethren Church to stimulate church attendance and the morning worship service at the Christ Lutheran Church broadcast from the church at 11:00 to 12:00 noon. The Christ Lutheran and the First Baptist Church regularly broadcast church services on a commercial basis on alternate Sunday mornings and during the week of January 14 the program originated from the Christ Lutheran Church.

(c) Station WSAN broadcast a total of 14 hours and 55 minutes of news during the week, plus several special news bulletins, a total of 80 news programs. In addition to the regular round-ups of news, special mention was made of Chronicle News presented daily, Monday through

Saturday, at 6:15 to 6:30 p. m. and Call News presented daily, Monday through Saturday, at 11:00 to 11:15 p. m., which features local news coverage in addition to news of national and international importance.

(d) Sports coverage during the week included an early round-up, 7:20 to 7:25 a. m., Monday through Saturday; Sports Chat, 6:05 to 6:15 p. m., Monday through Saturday; and sports headlines, daily at 11:15 to 11:25 p. m. A hunting and fishing information program was scheduled for Tuesday at 6:30 to 7:00 p. m., but was not broadcast during the sample week of January 14.

(e) During the sample week two programs of interest to those engaged in agriculture were broadcast, namely, a farm program at 12:30 to 12:45 p. m. daily, Tuesday through Friday, presenting market reports, announcements of interest to farmers and their families, and interviews with the Home Service representative for the Pennsylvania State Extension Service and with the local County Farm Agent; and another program at 6:00 to 7:00 a. m. daily, Monday through Saturday, presenting news, farm reports, farm information, interviews with local farmers and authorities on farming.

(f) Other programs during the week included a 30-minute program in the Pennsylvania Dutch dialects broadcast on Sunday afternoon, which is a regularly scheduled
966 program featuring the folk-lore of the community; and programs in connection with the March of Dimes originated by the station, using its mobile unit. One of these was the opening meeting of the fund-raising campaign and the other was a meeting at the Elks Club in connection with the same campaign.

92. In addition to the public service programs broadcast during the week of January 14, eleven public service programs, broadcast at other times, were described. Such programs included the Allentown Fair; a Lutheran Church Christmas Eve program, a Cedar Crest-Muhlenberg joint

program and a regular series of broadcasts under the auspices of the Allentown Public Schools. Twenty-one civic and public service organizations received a total of 336 non-commercial spot announcements during December 1950; twenty such organizations received 361 non-commercial spots during January 1951; and twenty such organizations received 283 non-commercial spot announcements during February 1951.

93. Station WSAN is the only station in Allentown which regularly broadcasts Allentown High School basketball and football games. These games are carried exclusively, pursuant to an agreement between Station WSAN and the high school, which gives WSAN the right of clearance for the broadcast of the games, i. e., if Station WSAN does not broadcast the games, any station desiring to do so must first obtain permission from Station WSAN. This arrangement covers a 5-year period and is now in its third year. It was obtained as a result of the installation at the expense of Station WSAN of a public address system in the high school stadium, score boards in the stadium and in the high school gymnasium and a clock used both in the stadium and the gymnasium. Prior to last year, some of the high school football games were broadcast on Station WSAN and the remainder on Station WSAN-FM, with the majority probably on Station WSAN-FM. Last year, however, all of the football games were broadcast on Station WSAN and all of the basketball games were broadcast on Station WSAN-FM only. Station WSAN also has the right of clearance for the local Catholic High School football and basketball games, and the station broadcasts about half of these games on Station WSAN and the remaining half on Station WSAN-FM. All of the games are locally sponsored. Station WSAN has also broadcast Muhlenberg College basketball and football games during past years and had exclusive rights to such games last year. The basketball games last year were broadcast only on Station WSAN-

FM. However, no athletic event for Muhlenberg College was being broadcast by the station during the current year.

94. It is the policy of Station WSAN, concerning the sale of time for religious programs, to sell such time when the programs are for a particular denomination. The
967 only non-commercial religious program now on Station WSAN is that produced by Rev. Bryan Musselman, who owns 60% of the station, with the balance being owned by his immediate family. Several years ago Station WSAN had a religious program under the auspices of the local Ministerial League which at one time was broadcast 5 days a week. However, the time was gradually reduced and changed until, without notice to the Ministers League, it was discontinued entirely in Decemebr 1950.

STATION WAEB PROGRAMS.

95. The president and general manager of Station WAEB testified regarding the programming of that station. This witness testified that he considers Allentown and Bethlehem as one since, in his opinion, their economic structare and habits are very much alike. He sells advertising in Bethlehem as well as in Allentown and carries programs for Bethlehem, but does not design programs for Easton or bring programs in from Easton, even though station break announcements sometimes refer to the station as "Serving the Allentown-Easton-Bethlehem area".

96. Station WAEB commences its broadcast day at 7:00 a. m., Monday through Saturday, and at 8:00 a. m. on Sunday and signs off at 12:30 a. m. daily, except Sunday when the sign-off time is 12:00 midnight, and is on the air a total of 121 hours weekly. The station is affiliated with the American Broadcasting Company network and, in addition, broadcasts programs of the Atlantic Baseball network. The Mutual Broadcasting System also buys time from the station, not as a network affiliation, but only for certain programs, namely, the Mark Trail, Clyde Beatty, and Victor Borge shows.

97. The programs for the sample week of January 14, 1951 are said to be representative of the program service rendered by Station WAEB. During that week the station devoted 61.53% of its total broadcast time to network programs; 32.57% to recorded and transcribed programs; 3.18% to wire programs; and 2.72% to locally originated live programs. During the same week 39.76% of the broadcast time was devoted to commercial programs, and 179 commercial spot announcements and 220 non-commercial spot announcements were broadcast. An analysis of the programs as to types shows that 71.12% of the programs of Station WAEB during the week were of an entertainment nature; 5.37% were classified as educational;[30] 4.88% were religious; 0.75% were agricultural; 1.47% were sports; 3.06% of a public service nature; and 13.35% were news.

968 98. Station WAEB provides free program time on a regular weekly or series basis to the local Community Chest, to the Allentown Public School District; to the Lehigh County Rent Office; and to the Junior Chamber of Commerce. It also provides time regularly on a sustaining basis to governmental agencies such as the U. S. Treasury Department; Social Security Administration; National Guard; Veterans Administration; and the United States Army, Air Force, Marine Corps and Navy. Spot announcements are broadcast regularly for the local public library, the Red Cross, the Bureau of Internal Revenue, Navy and Treasury Departments, and Veterans Administration. During the years 1949 and 1950, the station also provided program time intermittently to approximately 50 civic and public service organizations, governmental agencies, and spot announcements to approximately 13 others. Organizations for which such programs were broadcast include local schools and colleges, civic clubs, religious groups, federal, state and local governmental departments,

[30] None of the programs so classified was prepared by or on behalf of an educational organization as required by the definition of an educational program given by the Commission.

Boy Scouts, Girl Scouts, women's clubs, Y. M. C. A., Y. W. C. A., veterans organizations, Little Theatre group, Municipal Opera Society, Jewish Community Center, Crippled Children's Society, Guidance Clinic and similar organizations.

99. The witness submitted a list of programs not duplicated by any other station in Allentown or Bethlehem which Station WAEB had broadcast since it commenced operation. The various programs appearing on the exhibit were not explained and are not self-explanatory. However, an examination of the exhibit shows that at least 25 of such programs appear to be primarily network entertainment or sports programs. However, Station WAEB has carried some local features which do not appear to have been duplicated, at least during that particular day, by any other station. For example, the Pennsylvania Dutch Folk Festival at Kutztown was carried by remote line on four different days and the station was the only one in Allentown to carry such program.

100. It is the policy of Station WAEB to accept religious programs on both a commercial and a sustaining basis. Sunday programs on a sustaining basis include: a 30-minute network program entitled "Message of Israel"; the "Ave Marie Hour", a transcribed 30-minute program; and a 30-minute program entitled "National Vespers". Commercial religious programs on Sunday include a 1-hour program entitled "The Old-Fashioned Revival"; a 1-hour program entitled the "Baltimore Tabernacle"; a 30-minute program entitled "The Lutheran Hour"; a 30-minute network program entitled "The Greatest Story Ever Told" and another 30-minute program entitled "Missionary Hour". The only other religious programs are broadcast on Saturday, from 8:45 to 9 a. m. and from 7:30 to 8 p. m., both of which are sustaining. The program on Saturday evening is presented by Rev. Mathias who
969 testified as a public witness on behalf of Station WHOL. None of the religious programs on Station

WAEB is produced under the auspices of the Ministers League, although Rev. Mathias testified that such a program was broadcast daily, 5 days a week, until the station cancelled the program because of commercial commitments in order to broadcast baseball games. During 1950, Station WAEB also carried basketball games, professional baseball and football games, and the complete football schedule of the University of Pennsylvania. Polka music is presented as a "stock feature" on Station WAEB in the morning and again in the afternoon.

STATION WKAP PROGRAMS.

101. The general manager of Station WKAP testified with respect to the program service of that station. At the time of his testimony, the station was operating daytime only[31] and signed on at 7:30 a. m. and signed off at 5:00 p. m. daily, being on the air a total of 66½ hours weekly. The licensee of Station WKAP also operates an FM station which is on the air from 3:00 p. m. to 9:00 p. m. and duplicates the programs of the standard broadcast station until sunset when the latter goes off the air. This station does not have a network affiliation.

102. The week of January 14, 1951 is not a typical week in that Station WKAP tries to "funnel" such campaigns as the March of Dimes, Red Cross, and the Heart Fund, et cetera, into one week for each drive and the week of January 14, 1951 was the one devoted to the March of Dimes, to the exclusion of some of the other public service publicity. An analysis of the logs of the station for that week shows that programs classified as entertainment were broadcast 84.33% of the total broadcast time; religious programs 2.25%; agricultural programs 0.37%; news 6.26%; discussions 0.78%; and talks 6.01%. During the same week 1.5% of the broadcast time of such station was

[31] According to the Commission's records, Station WKAP started program tests June 14, 1951 under the new authorization for unlimited hours of operation, and a license to cover the construction permit for the new facilities was issued on August 17, 1951.

devoted to network[32] programs; 81.9% to recorded programs; 5.2% to wire programs; and 11.4% to locally originated live programs. The station had no educational programs on the air during the sample week. Commercial programs accounted for 58.5% of the broadcast time during the week. The record is not entirely clear as to just how many commercial spot announcements were made during the week. The program log shows only 156 such announcements; whereas, the analysis of spot announcements, not including announcements made at station
970 breaks, shows a minimum of 483 commercial spot announcements. The station representative testified that the 156 spot announcements made at station breaks were not included in the aforementioned 483 spots and it, therefore, appears that the station broadcast a minimum of 639 commercial spot announcements during the sample week. The station also broadcast 52 non-commerciail spot announcements during the week.

(a) During the week of January 14, 1951, Station WKAP broadcast only two religious programs, both of which were on a commercial basis and the time for which was purchased by individual ministers rather than church congregations. One of these programs originated in Philadelphia and the other was of local origin. The Junior Chamber of Commerce forum which appears to be produced as somewhat of a joint venture of several of the local stations, including Station WKAP, is broadcast over that station at 2:30 to 3:00 p. m. on Sunday. A women's program, entitled "Household World", is scheduled daily, Monday through Saturday, at 9:30 to 10:00 a. m. This program contains household hints, recipes, suggestions on the problems of teen-agers and children generally. On Monday at 10:45 a. m. the County Farm Agent conducts a 15-minute program of interest to farmers and their families. The "Sports Digest" is a 10-minute program broad-

[32] This station has no network affiliation and it is not clear from the record just what this represents, but it doubtless refers to the religious program which originates at Philadelphia and is carried by other stations.

cast at 4:45 p. m. daily, Monday through Saturday, which covers local sports and "hot headlines in the national sports picture". It is conducted by the news editor and sports man for the station. A program entitled "Man on the Street" is broadcast for 15-minutes begin ning at 2:45 in the afternoon daily, Monday through Friday, and consists of interviews with people on a downtown street in Allentown on questions of an entertainmet nature.

(b) The station's program schedule shows a program entitled "Club Time" which the station representative testified was for use by non-profit organizations to publicize their activities. However, the station does not attempt to obtain announcements for this program and there are times when there are no announcements made during the program. During the week of January 14, 1951, the program was not broadcast on Monday, Wednesday or Saturday, although it is represented to be a daily feature. On Tuesday of that week, the program consumed 2 minutes and 45 seconds; on Thursday, 4 minutes and 45 seconds; and on Friday, 3 minutes and 20 seconds. At no time on either of these three days was the program commenced at the same time, varying from as early as 8:52 a. m. to as late as 9:21 a. m.

(c) From the program logs of Station WKAP for the sample week, it appears that the program service being rendered by that station is made up of recorded
971 music interspersed with commercial announcements for more than 80% of the broadcast time, with the remainder of the time devoted to several short news broadcasts each day taken, in the main, directly from the Associated Press wire service, two commercial religious programs weekly, and some public service programs and spot announcements.

103. Several types of programs broadcast over Station WKAP are not reflected in the program logs of the week of January 14. For example, during the week following

the sample week the station broadcast two programs, totalling 50 minutes, featuring tape recordings of interviews with wounded Lehigh Valley veterans of Korea made at Valley Forge Hospital.

104. Station WKAP is said to be the first station in the area to develop a polka music program and it now has a library of approximately 3,000 records of various classifications. This station broadcasts a half hour of Italian music for the Italian population in the community. On Saturday, the station has a program designed especially for small children. It was testified that the station also carries programs by the Allentown schools and that since the school board does not want to bring the students to the studios and the plans of the different schools are such that remotes are not desirable, a station representative goes to the schools three or four days in advance, and tape records the programs for later broadcast. The station receives its news from an Associated Press wire but also has a news editor and two other employees whose duties include the gathering of local news. The station engages in editorializing in connection with matters of local interest but represented that it endeavors to have the opposite side presented. Station WKAP has no sustaining religious programs on the air. Although at the time of the hearing it had no programs representing the Jewish faith, the station representative testified that he had offered time to the rabbi of a local synagogue then under construction but no definite response to the offer had been received.

105. Programs designed for, or originating in, Easton are not carried over Station WKAP, except for the annual football classic between Lehigh University and Lafayette College which is played alternately at Bethlehem and Easton and broadcast by the station on spot news. An example of spot news from Easton broadcast by the station was publicity given with regard to the housing situation in Easton when the Delaware bridge approach was under construction.

974 112. Although the application[33] for the Easton station has not been amended as to its proposed programming since the 1946 hearing, the program proposals presented by this applicant differ in many respects from those indicated in the application as well as those proposed at the time of the 1946 hearing. As hereinbefore discussed, the Allentown applicant objected to the admission of such new evidence by the Easton applicant and such objection was overruled, to which ruling the Allentown applicant noted an exception. While we do not believe that the objection of the Allentown applicant was a valid one under the circumstances in this case, some of the differences in the program proposals presented at the two hearings and the application itself are material to a determination of the issues in this proceeding.

975 113. The proposed program schedules presented by the Easton applicant at the 1946 hearing will be discussed first. Such schedules were prepared by a "free lance" program consultant (who had been recommended by the director of network relations of the Mutual Broadcasting System) from material and notes furnished by Mr. Rounsley, the proposed general manager of the station.

(a) Analyses of the program schedules proposed by the Easton applicant at the 1946 hearing, on the basis of types of programs, show that it was then proposed to devote 50% of the total broadcast time to entertainment programs, 5% to educational programs, 3% to religious programs, 7% to agricultural programs, 15% to news, 5% to sports programs, 10% to fraternal and miscellaneous public service programs, and 5% to special features; and

[33] As hereinbefore discussed, the application form in use at the time the Easton Publishing Company application was filed did not require the inclusion of detailed program schedules. Such application does contain the following representation as to division of broadcast time based upon types of programs: entertainment 50%, educational 5%, religious 3%, agricultural 7%, news 15%, sports 5%, fraternal and miscellaneous public service 10%, and special features 5%; and, based on source of programs, about 45% of the time would be devoted to recorded programs.

that, based upon program sources, 63% of the total broadcast time was to be devoted to network programs (15% commercial and 48% sustaining), 21% to recorded (sustaining) programs, 4% to wire (sustaining) programs, and 12% to live (sustaining) programs, and the Commission so found in its original decision (3 RR 1225). It was further found that this applicant proposed a service consisting of 50% commercial and 50% sustaining programs. The Commission also found in its decision based upon the 1946 hearing record that the Easton applicant had made tentative arrangements for an affiliation with the Mutual Broadcasting System and no exception to such findings was made either to the Commission or to the Court. Approximately 345 commercial spot announcements per week were then anticipated; and it was represented that such time as may be necessary would be made available for sustaining spot announcements.

(b) At the time of the 1946 hearing, the Easton applicant held a conditional grant for an FM station in Easton and proposed a complete duplication of service on the AM and FM stations, and the Commission so found in its decision, *supra*. Here, again, no exception was lodged. It was then contemplated that members of its newspaper staff were to be used for the collection and presentation of local news programs, supplemented by a national wire news service. Programs of local interest, such as sports and society news, were also to be presented by members of the newspaper staff. The Easton applicant then proposed to make time available by means of forum-type programs for the discussion of controversial issues. Broadcasts by candidates for political office were to be on a commercial basis. Also, this applicant had then organized a citizens' advisory committee to assist it in developing a well-rounded program service adapted to the needs and desires of the community.

976 114. In view of the fact that the Easton Publishing Company represented at the 1951 hearing that in

the operation of the proposed Easton station it will follow the pattern of its FM Station WEEX, particularly with respect to local talent and cooperation with the institutions of learning in the area and that a majority of the programs will be duplicated over both the FM and AM facilities, an examination of the programs of the FM station which has been on the air since February 1948 is relevant. This is especially true in view of the fact that duplication of programs on the AM and FM stations was also proposed to the Commission at the 1946 hearing. The FM station is licensed for unlimited hours of operation[34] but does not sign on until 3:00 p.m. (except on one day every other week during the school year when it signs on 15 minutes earlier to present a program in cooperation with certain schools) and signs off at 12:05 a.m. It is thus on the air about 64 hours weekly.

115. The program logs of the FM station (WEEX) for both the 1950 composite week and for the sample week of January 14, 1951 are in the record. Based upon types of programs, 79.26% of the total broadcast time was devoted to entertainment during the sample week, 2.22% to religious; none to agriculture; 1.17% to education; 12.79% to news; 1.17% to discussion; and 3.39% to talks; and, based upon program sources, 74.52% to recorded programs and 25.41% to local live programs. During the sample week, 3.87% of the total broacast time was devoted to commercial programs; and 108 commercial spot announcements and 61 non-commercial spot announcements were broadcast. The station was actually on the air 63 hours and 15 minutes during such week. There is a slight discrepancy in the percentages as to source of programs, in that no wire programs are reflected even though one of the daily news programs is not listed as being of live studio or remote origin. During the composite week the

[34] Section 3.261 of the Rules and Regulations of the Commission require a minimum of 6 hours of operation daily for an FM station, of which 3 hours must be between 6 a.m. and 6 p.m. and 3 hours between 6 p.m. and midnight.

station broadcast 18 public service programs of at least 15 minutes duration and during the sample week, 20 such programs.

116. Programs of FM Station WEEX for the three-year period from February 1948 to February 1951, denominated "Highlights" by the applicant, include broadcasts by means of tape recording of a 4-H Club contest from Dorney Park in Allentown, and of the Warren County Fairs from Harmony, New Jersey. Other programs mentioned include a "Meet the Mayor" series, consisting of interviews with the mayors of 14 neighboring towns; the Chamber of Commerce annual dinners at a local hotel, Station
977 WEEX being the only station to provide simultaneous live broadcasts of such dinners although Station WEST tape recorded and broadcast them at a later time; proceedings of the 1948 National Conventions of both the Democratic and Republican parties, said to be the only local station to carry the complete proceedings,[35] undisclosed number of programs from Lafayette, 2 from Cedar Crest, and 2 from Muhlenberg Colleges, as well as 19 from Centenary Junior College;[36] approximately 75 interviews with visiting celebrities; and one or more programs each by musical groups, such as Pennsylvania All-State Symphony, Bethlehem Bach Festival, and the Budapest String Quartet.

117. During this three-year period, Station WEEX broadcast an average of 185 spot announcements monthly for governmental, civic and welfare groups. There were also thirty 15-minute and four 30-minute transcribed programs broadcast monthly for the Armed Services and the Treasury Department, and a total of fourteen 15-minute live studio programs each month for such agencies and groups as the Department of Agriculture, Farm Agent,

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[35] Station WEST carried the National Broadcasting Company's originations from the conventions.

[36] Includes 18 dramatic sketches and a speech by Mrs. Eleanor Roosevelt.

Home Demonstration Agent, Easton Library,[37] and others. The station also broadcast 44 football games, college and high school, of which 34 were said to have been exclusive. The baseball semi-finals of the National Collegiate Athletic Association in which Lafayette College was a semi-finalist were broadcast on a sustaining basis. The series of four games in which Lafayette College participated was played in Winston-Salem, North Carolina and brought to Easten by remote lines. The Easton area Junior Olympics were arranged by the Easton Department of Recreation in cooperation with the station, the latter providing the trophies and presenting them to the winning schools. The station tape recorded the proceedings at the stadium, including interviews with the captains of the winning teams, and broadcast them on an exclusive basis.

118. During this three-year period FM Station WEEX broadcast 172 programs featuring local singers, musicians, and actors, including 22 teen-age talent shows during the course of which more than 800 teen-agers were auditioned and 207 appeared on one or more of these programs. Although these teen-age programs have been "quite successful", according to the testimony of the general manager of the station, no such program has been presented on the FM station in the last year and a half. Several of the dramatic presentations were by the Easton Players Guild, a non-profit civic theater in Easton which offers an opportunity for the development of local talent and brings such talent to the attention of the public. At the time of the 1951 hearing, it had been using the facilities of FM Station WEEX for about two years and was then broadcasting a weekly 30-minute program. The station buys the scripts, furnishes the dramatic direction through one of its announcers, and supervises the over-all production of the show. Approximately 151

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[37] None of these programs by the Department of Agriculture, Farm Agent, Home Demonstration Agent or Library appeared during either the 1950 composite week or the sample week of January 14, 1951.

panel programs were broadcast during the three-year period, including those participated in by local civic clubs (30), local American Legion post (4), League of Women Voters (30), Safety Council (5), Social Security Discussion Series (80), Employ Physically Handicapped Board (1) and Easton Recreation Board (1). Broadcast of Scouts' activities during the three-year period included two programs for Boy Scouts from Camp Weygandt, one from National Camporee at Valley Forge, and studio programs on an occasional basis, but never on a weekly basis; and an anniversary program for the Girl Scouts.

119. School activities broadcast include one or more concerts by the Easton High School Glee Club in 1948 and 1949; Wilson High School operetta and glee club concerts; Phillipsburg High School Glee Club concerts; Forks Township Glee Club concerts; Centerfield Glee Club; and Allentown High School Alumni Choir. FM Station WEEX began a series of music appreciation broadcasts for grade school children in October 1949 in which 11 schools from nearby areas then participated and 13 schools now participate. More than 30 FM sets have been placed in the various school districts either through the Board of Education or through the efforts of the local P.T.A. These programs are under the supervision of a central committee, with membership from principals and music supervisors of the participating schools, which sets up the program schedule, approves all script prior to broadcast and evaluates all programs after they have been broadcast. The script is written by the children under the guidance of the teacher and is in the form of a dramatized program, the music being incidental or supplemental to the plot. The number of children appearing on the program varies, having been as high as 40. The programs go on the air at 2:45 every other Thursday and are 15 minutes in length. After the children have listened to a program they evaluate and discuss it. No other local station has offered

the same sort of cooperation in the furtherance of this educational work. In the event the proposed Easton station be established, it is represented that the program would be expanded to take in a greatly increased number of students. One of the programs was tape
979 recorded so that it could be demonstrated to the music section of the Northampton County Teachers Institute. The program has also been recognized in the County Teachers paper.

120. Numerous differences are found between the 1946 program proposals of the Easton applicant and the actual programming over its FM station. For example, Station WEEX has no regularly scheduled music programs, dramatic programs, or competitive quiz programs from the high schools and junior high schools in the area. Such programs were proposed for both the AM and FM stations at the original hearing on the AM application. Another example, programs were to be originated at Lafayette College and to be built around the Lafayette Glee Club, band and orchestra under the direction of Dr. Erb, the Lafayette College Director of Music. However, Station WEEX has only broadcast the Lafayette Glee Club about twice a year and appears to have broadcast only one concert by the combined musical groups of Lafayette College. Another feature proposed at the original hearing was a music appreciation program to be produced with the assistance of Dr. Erb. The station, however, has not broadcast any such programs from Lafayette College. The only music appreciation program which it has is broadcast every other week for a period of 15 minutes prior to the station's normal sign-on time and is directed to grade-school students. Station WEEX is not regularly broadcasting any programs designed especially for the women audience, although such programming was included in the program plans presented at the original hearing. At the original hearing, it was proposed to broadcast direct from local churches beginning at 11:00 a.m. on Sunday mornings.

Station WEEX is not regularly broadcasting services directly from churches for the reason, it is said, that the services occur on Sunday morning before the station commences operation. At the 1946 hearing, the Easton Publishing Company proposed to broadcast a book review program each Saturday afternoon by the Librarian of the Easton Public Library; whereas, no such program appears on the program schedules of Station WEEX for either the composite week or for the sample week of January 14, 1951. A book review program, according to the program witness of the Easton Publishing Company, was at one time broadcast on an occasional basis. The program proposals of the Easton Publishing Company in 1946 also included a one-half hour morning farm program, Monday through Saturday, in which the Farm Agents from Warren and Hunterdon Counties, New Jersey and Northampton County, Pennsylvania would participate. Station WEEX broadcasts only one 15-minute farm program per week, and the Farm Agents from Warren and Hunterdon Counties have never appeared on Station WEEX. The Easton applicant also proposed programs, on a regular basis, designed for children. While some programs have been broadcast by the Boy Scouts, such programs have never been on a regular basis, and there is no
980 program on Station WEEX at the present time especially designed for children. One children's program was shown in the composite week of 1950, a 5-minute Story of the Carols. Another proposed program in 1946 was a Sunday afternoon program to be entitled "My Idea is This" and to consist of practical talks by local ministers and educators. Such programs have been broadcast on Station WEEX, but not on a regular basis. The Easton applicant also proposed a 15-minute evening program to be broadcast on Monday, Wednesday and Friday entitled "Society Page" to be produced by the society editor of the Easton Express. The same society editor is still employed by the newspaper, but she does not have a

program on the FM station, nor has she ever had a program. At the 1946 hearing, a weekly Saturday morning teen-age talent show was proposed, with the hope that the time could be increased or that it could be broadcast more than once a week. There have been no such programs on the station for the past year and a half, and prior thereto only 22 such programs were broadcast. According to the witness' recollection, these 22 programs were 30 minutes in length and were broadcast every other week. The foregoing are cited as examples of the program proposals made by the Easton Publishing Company in support of its AM application in 1946 which have not been broadcast over its FM station. The record contains other proposals of a similar nature which have not been carried over Station WEEX.

121. The 1951 program proposals for the proposed Easton station show that the station would sign on at 7:00 a.m. every day, except Sunday when it would sign on at 8:00 a.m., and would sign off at 12:15 a.m. daily, with actual broadcast hours totalling 119¾ hours weekly. Analyses of the presently proposed program schedule of the Easton applicant, on the basis of types of programs, show that percentagewise 77.23% of the total broadcast time is to be devoted to programs of entertainment, 3.97% to religious programs, 1.74% to agricultural programs, 1.46% to educational programs, 7.80% to news, 2.30% to discussions, and 5.50% to talks. It is also represented that 75.07% of the total broadcast time will be devoted to transcribed programs and 24.93% to live programs; and that not more than 65% of the total broadcast time will be devoted to commercial programs.

It is also represented that the number of commercial spot announcements per week is unknown but that such announcements will not exceed three in a 14½ minute period and probably will not total more than 250 to 300 weekly, and that the non-commercial spot announcements will depend entirely upon the needs of the community. (Station

WEEX now averages about 150 spot announcements per week, more than half of which are non-commercial.)

981 As has been hereinbefore noted, with minor exceptions the presently proposed program schedule for the AM station is a duplication of the present FM station programming during the hours the FM station is now on the air. It is said that the proposed programming does not include many important programs that would be broadcast but could not be scheduled in advance because of their seasonal or occasional occurrence. These include sports and special events.

122. The Easton applicant expects to continue the broadcasts of the 4-H Club, Grange special events, and expand the farm program so as to include the Farm Agents of Warren and Hunterdon Counties in New Jersey. Important civic events will continue to be broadcast as will also athletic, dramatic and musical highlights. Youthful talent will be given an opportunity over the proposed operation, and the applicant will continue to bring interesting personalities before the microphone. Provision has also been made for the daily broadcast of a 25-minute woman's program. Panel discussions are considered very important and it is represented will be carried on a regular basis; the "roundtable" program, now broadcast only on an occasional basis over Station WEEX, has included a series by the local civic clubs, the American Legion, Safety Council, and others. A "discussion panel", which is presently conducted by the League of Women Voters over Station WEEX, and a current-events panel now heard over the station under the auspices of the Business and Professional Women's Clubs will also be continued. Station WEEX presently broadcasts Parent-Teachers Association programs on an occasional basis. There is such an association for practically every school in the Easton area, and the applicant proposes to have a regularly scheduled series of programs in the event the AM facility is established. The

Music Appreciation Series which began over Station WEEX in October 1949, and hereinbefore discussed, will be carried on a weekly basis. Similarly, the Home Economist program, which began on Station WEEX in December 1948, and the plays by the Easton Players Guild, which series began on Station WEEX in March 1950, will be continued on a weekly basis. The Book Shelf, a program which has been broadcast occasionally over Station WEEX by the librarian of the Easton Public Library, is scheduled for weekly presentation.

123. The "Teen-Age Talent" program which has been broadcast over Station WEEX and featured a total of 207 individuals out of more than 800 who were auditioned, has been regularly scheduled for 30 minutes each Saturday. It will be conducted as it has been in the past over Station WEEX. Station representatives will go to the various schools, address the assemblies and invite students to appear for audition, from which applicants those of broadcast caliber will be selected. No sports events are
982 listed in the proposed schedule of their seasonal nature. The applicant proposes to continue to broadcast in season baseball, football, and basketball games. Religious programs will include a weekly church service broadcast from the various churches on a sustaining basis, arrangements having already been made with the Easton Ministers' Association. There will be continued the Church Service of the Air on Sunday afternoons, which series began on Station WEEX in October 1948, and is under the auspices of the Easton-Phillipsburg Ministers' Association; also a Catholic program which began on Station WEEX in January 1949; and a program conducted by the Mormons which began on Station WEEX in November 1949. The applicant hopes also to schedule a Jewish program. In the past it has endeavored to arrange such a program over Station WEEX in connection with the Church Service of the Air series but the two Easton rabbis, it is said, did not care to take on a regular program; broad-

casts have been arranged for the Jewish audience on special occasions. In addition, there will be broadcast each day a 15-minute devotional program; and the weekly "Vesper Meditations" program, which began on Station WEEX in July 1949 under the auspices of the Federation of Church Women, will be continued. Local area newscasts will be continued. Definite arrangements have not been made for the production of all of the programs listed and proposed to be broadcast over the AM facility, but the facilities have been offered to the respective groups.

124. The facilities of the proposed station at Easton will be made available without charge to all civic organizations and, generally, to all federal, state and local governmental agencies. The proposed station also will endeavor to arrange for the broadcast of discussions of general public interest, in the form of a debate or panel discussion, if possible. The facilities of the proposed station will be offered without charge to the various religious organizations in the community, on a rotating basis. Political broadcasts will be carried, with equal opportunity being afforded to each candidate for public office to purchase time.

125 (a). *C. Hammond Blatchford,* director of public relations at Centenary Junior College, Hackettstown, New Jersey, testified at the 1951 hearing. The college has a radio department and its physical equipment includes an auditorium with a broadcasting studio and has used the facilities of FM Station WEEX since the station was established. The programs broadcast by the college students are discussed under the Easton programming.

The college has been offered the facilities of the 983 AM station proposed at Easton.[37a] The witness

[37a] An examination of the Easton exhibits discloses that the city of Hackettstown is located at least 6 miles beyond the 0.5 mv/m and about 14 miles beyond the 2 mv/m daytime contours, respectively, of the proposed Easton station, and a much greater distance beyond the interference-free nighttime contour of such proposal.

thinks the college would like to add to its use of Easton radio facilities and hopes it may be possible for the college to maintain a direct wire between Hackettstown and Easton so that the students would not have to make the trip between the two cities, as is now done. The college has used the facilities of Station WEST and has never been refused time by that station.

125 (b). The president of Lafayette College, *Ralph C. Hutchinson*, testified at the 1951 hearing with respect to the present availability and use of radio facilities in Easton by the college. The present facilities of FM Station WEEX are used "quite extensively", on what Mr. Hutchinson termed "our state occasions", such as Founders' Day and commencement activities which feature speakers of national and international renown; dinners; musical events; speeches of foreign students and faculty members; and football and baseball games, including out-of-town games.[37b] The facilities of the proposed AM station have been offered to the college and he expects the college to make use of such facilities. However, President Hutchinson said he would not say that the college had plans for greater use of the proposed station; and that, although he would like to have "more complete listener coverage" of the college events, the college has had all of the "event coverage we have asked for or wanted" on both FM Station WEEX and AM Station WEST. The college has no publicity department but does employ a man on a part-time basis to write for the newspapers. President Hutchinson "assumes" that this man is employed for the remainder of his time by the Easton Express.

125 (c). *William R. Nixon*, the superintendent of a consolidated school district comprising the first eight grades, with an enrollment of about 300 students and located north of Easton, testified at the 1951 hearing. He appeared

[37b] Station WEEX has allowed the Lafayette College campus radio to pick up and rebroadcast the out-of-town games.

primarily in the capacity of chairman of the committee of the music appreciation program for elementary schools[37c] broadcast every other week for a 15-minute period over FM Station WEEX. The music appreciation program is
984 discussed in some detail in connection with the Easton applicant's programming. The facilities of the proposed station have been offered to Mr. Nixon's group and he feels that the program could be expanded over the AM station because of the greater number of AM receivers available; even though, in his opinion, FM provides a better form of reception than AM, especially for music. It was his testimony that "we would get a bigger coverage (over the proposed AM station), not better programs." Mr. Nixon has not made a "deliberate effort" to obtain time over the AM station (WEST) now operating in Easton.

125 (d). *Lawrence L. Mason*, the president *pro tem* of the Easton Players Guild, testified in support of the Easton applicant.[37d] The Guild is a non-profit civic theatre which now puts on a half-hour dramatic program over Station WEEX weekly. The facilities of the proposed AM station have been offered the Players Guild. The station furnishes the scripts, the dramatic director and over-all supervision of the production of the show and the witness testified that the assistance of Station WEEX has done a great deal toward keeping the group together.

126. There is confusion in the record on an important phase of the programming proposed for the Easton station, namely, network affiliation.[37e] This confusion is largely due to the seeming contradictions in the testimony of the

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[37c] The record is silent as to which, if any, of these elementary schools are located within the primary service area of the proposed Easton station.

[37d] It was developed through later cross examination of the station manager that Mr. Mason is also employed by the applicant as a news reporter for the Easton Express.

[37e] According to the application, network programs are not contemplated and no correspondence had then been had, or negotiations, discussions, or understandings (oral or written) entered into with respect to network programs; but "Applicant would consider carrying network programs if they should become available and if they were not received in this area and if they would not interfere with applicant's plan to give a complete local service."

general manager with respect to plans for the proposed station. The board of directors had, at the time of the 1946 hearing, we were then told by this witness, reached the conclusion "that a network affiliation will be acquired if at all possible"; and the Easton Publishing Company then reflected an affiliation with the Mutual Broadcasting System network in the program schedule which it
985 represented to the Commission that it would broadcast in the event of a grant of its application. Mr. Rounsley (the then, and now, proposed general manager of the station) testified in 1946 that he had been approached by the Mutual Broadcasting System and "sounded out" as to whether or not the Easton Applicant would be interested in becoming a Mutual affiliate and that, "when it came time to set up a sample program for the Commission, we included in that program such programs as we were assured—let me correct that—such programs as the Mutual Broadcasting Company (sic) expected to be able to furnish us." This witness, according to his own admission on the witness stand at that time, was unfamiliar with the make-up of some of the network programs contained in the 1946 proposed program schedule. The program schedule proposed at the 1951 hearing contains no network programs and no mention of the network affiliation question was made on direct examination. Under cross examination by counsel for Allentown, the general manager and program witness for the proposed Easton station first testified that the "present plan" is not to have a network affiliation.[38] Later on,

[38] When Mr. Rounsley was first asked concerning network plans, the following colloquy took place:

Cross-examination by Mr. Rollo:

"Q. I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network program on your proposed AM schedule.

"A. That is correct.

"Q. That is your present plan, is it?

"A. That is the present plan.

"Q. You no longer desire to affiliate with Mutual?

"A. There has been no conversation with Mutual in the past five years.

"Q. You recall you originally testified you planned to affiliate with Mutual, do you not?

"A. I said we expected to discuss it with Mutual, but no arrangements have been made."

during cross examination by counsel for the Commission, this same witness testified that network commercial religious programs might be accepted by the station
986 in the event of a network affiliation; and then in reply to another question from counsel for Allentown said that he had not said, in answer to the earlier question (footnote 38) that affiliation with a network is not intended[39] and that, "if offered a desirable affiliation, we would certainly consider it." At the conclusion of cross examination, the witness was questioned by the Presiding Officer in an effort to clarify the record as to the actual plans of the Easton applicant with respect to network affiliation for the proposed station. This questioning[40] did not attain the desired goal of clarification.
987 The record does not show what network programs would be broadcast in case a network affiliation which it considers "desirable and available" should be found by the Easton applicant, or what programs now proposed would be scrapped to make way for network programs.

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[39] The text of the question and answer follows:

(By Mr. Rollo):

"Q. Did not you answer a question of mine to the effect that you did not intend to affiliate with the network?

(By Mr. Rounsley):

"A. I did not say we did not intend to. I said we made no overtures at all. That is in the remote possibility that some time in the indefinite future we might affiliate."

[40] By the Presiding Officer:

"Q. Mr. Rounsley, I am a little confused about this network proposition. I wish you would tell me what your plans are with respect to network. Now let us not talk about the dim distant future, let us talk about something not quite so far away.

"A. If we have an AM facility we would probably explore the possibility of a network affiliation. We would naturally have to see what was available, what the terms are, something we do not know now, but we would explore that possibility.

"Q. Am I to understand you would not wait for somebody to come to you?

"A. That is correct. In other words, we would have to have something to affiliate before we talk business.

"Q. It is still not clear in my mind. Do you plan to sit by and wait for somebody to approach you, or what would be your procedure?

"A. I think we would probably see what was available, and after we saw what was available, if there was a network that we thought was desirable and available, we would probably call them."

127. At the time of the original hearing, some emphasis was placed upon the role of a Citizens Advisory Committee, consisting of eight educational, civic, religious, and agricultural leaders of the community, which was to meet at regular intervals and assist the Easton applicant in producing community-type programs. The evidence at the further hearing shows that, although a dinner meeting was held on one occasion, the plan has not been further implemented. In fact, the general manager of the station now feels that it is "obviously silly" to get seven or eight busy people together "to get advice on one field of activity." Some of these persons are said to serve individually in an advisory capacity. No member of the committee testified at the hearing

127 (a) In addition to the news editor and news reporter employed by the radio station, the news gathering facilities of the Easton Express will also be available to the proposed station, as will the Associated Press wire news service. No news commentaries are broadcast over the FM station and none will be broadcast over the AM station.

Comparison of Present and Proposed Service at Easton

128. A comparison of the local program service now being rendered in Easton by Station WEST with that proposed to be rendered by the Easton applicant in the light of the program descriptions in the record shows the following:

Easton applicant's presently proposed program schedule:	*Station WEST presently broadcasts:*
Weekly 30-minute round-table panel discussion program.	Weekly 30-minute program, Junior Chamber of Commerce Forum of the Air.
Weekly 15-minute panel on current events produced by Business and Professional Women's Club.	Weekly 15-minute program on which League of Women Voters and local Girl Scouts alternate on Saturdays.
Weekly 15-minute interview program conducted by columnist of Easton Express.	

988 Broadcast of church services from local churches on rotating basis at 11 a.m. to 12 noon each Sunday.	Broadcast of church services from local churches on rotating basis at 11 a.m. to 12 noon.
30-minute program on Sunday afternoon, entitled Church Service of the Air.	15-minute program on Sunday morning by colored minister.
Daily 15-minute devotional program, Monday through Saturday.	15-minute devotional period daily, Monday through Friday, by local ministers.
Weekly 15-minute program, vesper meditations.	One-minute prayer daily, Monday through Saturday, by local ministers.
	14-minute Sunday School lesson study on Saturday morning.
Two 10-minute farm programs, Monday through Friday, and 15-minute program on Wednesday, by county agents.	25-minute farm program, Monday through Saturday, in which county farm agents participate.
Weather reports on Monday through Friday farm programs.	5-minute weather reports twice daily, Monday through Saturday.
Weekly 15-minute program for Parent-Teachers Association.	During the year 1950, Station WEST broadcast a series of sixteen 15-minute programs for the Easton Parent-Teachers Association and a series of twenty-three 15-minute programs for the Phillipsburg Parent-Teachers Association. The program alternated each week between the Easton and Phillipsburg Parent-Teachers Associations.
15-minute music appreciation program on weekly or bi-weekly basis in cooperation with elementary schools.	Concerts and choruses by the Easton Oratorio Society; performances by the Lafayette College Choir; a performance by St. Johns Youth Choir have been broadcast.
Musical programs by local groups are proposed but not definitely scheduled.	
989 30-minute weekly teen-age talent show. This type of program was broadcast for a time over the FM station of the applicant but has not been broadcast for more than a year.	The Manager of Station WEST testified that the station has endeavored over a period of 15 years to develop local talent, but that the talent will not spend the time in rehearsal necessary to produce broadcast quality. Efforts have been made with the local schools which culminated in a 3-hour meeting of representatives of the station and of the various local schools. The station wanted to present programs by the school organizations, but as a result of the meeting, the school representatives decided that the faculties of the various schools did not have time to devote to rehearsals after school hours with the students who would participate.

30-minute program from Service Club luncheons on Wednesday.	Typical programs of the Service Club luncheon type, including several broadcasts relating to the Citizens Committee for the Hoover Report, the Kiwanis Club, the Knights of Columbus Convention in Easton; activities of Pennsylvania Week; programs for the Chamber of Commerce and the Junior Chamber of Commerce, etc. have been broadcast. Chamber of Commerce awards program was broadcast during the sample week.
Weekly 30-minute mystery drama by Easton Players Guild.	Productions of Easton Players Guild have been publicized. Only network dramatic shows are broadcast.
Weekly 30-minute program—Drama Work Shop—by Centenary Junior College students, Hackettstown, New Jersey.	
Sports will be broadcast in season.	Local sports, including high school and college games, broadcast.
	Sports news broadcast daily.
990 25-minute program, Women's Page Monday through Saturday.	15-minute program, Monday through Friday, reporting activities of interest to the women listeners.
Weekly 15-minute program by Home Demonstration Agent.	During 1950 a series of twenty 15-minute programs on home economics prepared and delivered by the Home Economist of the Northampton County Agricultural Extension Service were broadcast.
15-minute weekly program of interest to veterans.	Two 15-minute veterans programs are broadcast weekly.
Nine news programs daily.	Eleven or more news programs, exclusive of network news programs, are broadcast daily, except Sunday when only six are broadcast.
15-minute weekly program based upon wire and mail material from Washington.	
Weekly 15-minute program by public library.	15-minute live program entitled "Library Day" carried during sample week. None appears to be carried regularly.
Other programs proposed by the Easton Publishing Company consist principally of entertainment programs, a substantial majority of which would be on records or transcriptions.	Station WEST broadcasts live and network programs of entertainment value, and other public service, religious, educational, dramatic, musical, and discussion programs, both of local and network origin.

991 *Proposed Program Service of Allentown Applicant*

129. As hereinbefore discussed, the Allentown Broadcasting Corporation, pursuant to the grant which it received as a result of the original hearing in 1946, constructed Station WHOL in the face of the appeal of the grant by the Easton Publishing Company, and that station is now, and has been since September 1948, in operation. The Allentown Broadcasting Corporation proposes to continue the same general type of program service it is now rendering to Allentown and community and its proposed program plans[41] are in most respects the actual programs now being broadcast over Station WHOL.

130. It is now and will continue to be the policy of Station WHOL to provide time without charge to all local bona fide organizations of a civic, charitable, religious or fraternal nature. The station takes the initiative in many instances in planning programs for such groups and seeking out events which are of public interest for broadcast. During the period September 1948 through December 1950 the station broadcast a total of approximately 2,480 public service programs, aggregating about 731 hours, and a total of 7,488 non-commercial spot announcements, for various non-profit organizations of a civic, religious, charitable, educational, governmental, fraternal and miscellaneous nature. The number of organizations participating in these programs and announcements totals approximately 145.

(a) Station WHOL is affiliated with the Columbia Broadcasting System network and proposes to continue such affiliation.

131. The record shows in detail both the programs of Station WHOL for the composite week of 1950 and for the selected week of January 14, 1951. The composite week of 1950 is substantially typical of the local programs of

[41] The Allentown application was amended in 1950 to reflect its current programming plans.

Station WHOL and the week of January 14, 1951 is typical with respect to the network programs carried by the station.

132. During the composite week of 1950 network programs were carried 52.76% of the time; recorded and transcribed programs, 35.63%; wire programs, 4.99%; and live locally originated programs, 5.62%.[42] An analysis of the programs of the composite week, on the basis of 992 types, shows that 77.65% of the total broadcast time was devoted to entertainment programs, 1.48% to educational and cultural programs, 3.59% to religious programs, 11.09% to news, 0.84% to agricultural programs, 2.60% to sports, and 2.75% to speeches and interviews. During the same composite week, 41.82% of the total broadcast time of the station was devoted to commercial programs; and 370 commercial spot announcements and 131 non-commercial spot announcements were broadcast.

133. During the week of Janaary 14, 1951, selected as the sample week for all of the stations in the area, Station WHOL devoted 76.60% of the total broadcast time to entertainment programs, 3.72% to religious programs, 1.26% to educational programs, 12.92% to news, 1.05% to discussion, and 4.43% to talks. During the sample week, the station devoted 57.49% of its broadcast time to network programs, 34.65% to recorded and transcribed programs, 3.37% to wire programs, and 4.49% to locally originated live programs; and 50.95% of the broadcast time was devoted to commercial programs, and 405 commercial spot announcements and 134 non-commercial spot announcements were broadcast.

134. Since the 1950 composite week is typical of the local programs and the sample week of January 14, 1951 is typical of the network programs broadcast by Station WHOL,

[42] These percentages total 99% rather than 100%. This appears to be due to the fact that the percentages are carried out only to two decimal points.

particular attention will be given to the local programs of the composite week and to the network programs of the sample week.

135. Specific examples of locally originated programs during the composite week of 1950 include the following: Cedar Crest College Drama, one of a series of live dramatic programs presented on a sustaining basis by the Dramatic Society of Cedar Crest College and it is noted that Station WHOL is the only station in the Allentown area which carries programs produced by this group; and the Bulletin Board program in which local civic, social and charity announcements are broadcast on a sustaining basis, which at the present time is a 15-minute program, broadcast Monday through Friday. No other station in Allentown or Bethlehem broadcasts any program similar to the Bulletin Board. Other examples of local programs broadcast during the composite week of 1950 include a 1-hour concert direct from St. John's Lutheran Church in connection with the dedication of a new organ in the church; a 30-minute address given in Allentown by the National Commander of the Veterans of Foreign Wars; a weekly 30-minute program consisting of travel news of educational value sponsored by the Allentown Motor Club; and a weekly 30-minute program entitled "Pumpernickel Bill", a program presented in Pennsylvania Dutch dialect by a
993 columnist who has had a dialect column in the Allentown Morning Call for the past 25 years. Continuously since May 1949, and including the composite week, Station WHOL has broadcast weekly a 15-minute program in cooperation with the area rent control office and another one in cooperation with the Veterans Administration. Examples of other local programs broadcast by the Allentown applicant are hereinafter discussed in paragraphs 140-142 and 144-146.

136. During the sample week of January 14, 1951, Station WHOL broadcast numerous programs of the Columbia

Broadcasting System. Included among the network programs were four daily programs: a 15-minute program entitled "CBS World News"; a 15-minute program entitled "CBS News of America"; a 15-minute program entitled "The World Tonight and News Analysis"; and a 5-minute newscast by Cedric Adams. In addition to these daily programs, network programs broadcast Monday through Friday during such week included a 1½ hour program entitled "Arthur Godfrey Time"; eleven 15-minute "soap operas"; a 30-minute program entitled "Strike it Rich"; an audience participation quiz program originating in New York City; a 15-minute world news program from Washington, D. C.; a 15-minute discussion on scientific achievements; a 15-minute program of popular music by Jack Smith; a 15-minute news program by Lowell Thomas; and a 15-minute news program by Edward R. Murrow.

137. In addition to the daily programs listed in the preceding paragraph, Columbia Broadcasting System network programs broadcast by Station WHOL on Sunday of the week of January 14, 1951 include a 15-minute program of Negro spirituals entitled "Chariot Wheels"; a 30-minute program of organ music by E. Power Biggs; a 1½ hour program by the New York Philharmonic Orchestra; a 30-minute program entitled "Symphonette", a program of symphonic excerpts and short classical favorites; a 30-minute adventure drama entitled "Escape"; a 30-minute comedy or dramatic program netitled "Make-Believe Town"; a 30-minute audience participation program entitled "Dollar a Minute"; a 30-minute program entitled "Godfrey Digest", a compilation of excerpts from the daily Arthur Godfrey show mentioned in the previous paragraph; a 45-minute program entitled "Meet Frank Sinatra"; a 15-minute news commentary from Washington, D. C. by Eric Sevareid; a 30-minute mystery program entitled "Charlie Wild, Private Detective"; a 30-minute comedy program featuring Jack Benny; a 30-minute comedy program by Amos and Andy; a 30-minute program featuring Edgar

Bergen and Charlie McCarthy; a 30-minute comedy program featuring Red Skelton; a 30-minute comedy drama entitled "Corliss Archer"; a 30-minute musical program by Horace Heidt; a 30-minute musical program entitled "The Contented Hour"; a 15-minute program en-
994 titled "Choraliers" which featured choral arrangements of song favorites; and a 15-minute talk by Basil O'Connor in connection with the Infantile Paralysis Foundation.

138. Network programs of the Columbia Broadcasting System broadcast over Station WHOL on Saturday of the week of January 14, 1951 include a 30-minute hillbilly musical program entitled "Barnyard Follies"; a 15-minute program entitled "Garden Gate", a program on gardening; a 30-minute musical program entitled "Refreshment Time" featuring Morton Downey; a 5-minute news summary from Washington, D. C. by Bill Shadel; a 30-minute dramatic program entitled "Somerset Maugham Theatre"; a 30-minute dramatic program entitled "Theatre of Today"; a 25-minute dramatic program entitled "Grand Central Station"; a 30-minute program entitled "Stars over Hollywood"; a 30-minutes audience participation quiz program entitled "Give and Take"; a 30-minute musical program featuring teen-age talent and entitled "Make Way for Youth"; a 30-minute discussion program entitled "Cross-Section USA"; a 30-minute musical program entitled "Saturday at the Chase"; a 15-minute news program from Washington, D. C. by Griffing Bancroft; a 15-minute program entitled "Memo from Lake Success" which reviews the week's developments by the United Nations; a 30-minute dramatic program entitled "Yours Truly, Johnny Dollar"; a 30-minute western program entitled "Hopalong Cassidy"; a 30-minute show entitled "Gangbusters"; and a one-hour musical and listener participation program entitled "Sing it Again."

139. Other programs of the Columbia Broadcasting System network broadcast by Station WHOL during the sample week of January 14, 1951 and not heretofore discussed, include a 15-minute orchestra program entitled "Music You Know"; the Lux Radio Theatre, a one-hour dramatic program; a 30-minute comedy show entitled "My Friend Irma"; a twice weekly 15-minute orchestra program entitled "The Chicagoans"; a 30-minute dramatic program entitled "Dr. Christian"; a 30-minute comedy program featuring Harold Perry; a 30-minute musical program featuring Bing Crosby; a twice weekly 15-minute orchestral program entitled "St. Louis Matinee"; a 30-minute program entitled "Mr. Keene, Tracer of Lost Persons"; a 30-minute dramatic program entitled "Suspense"; a 30-minute dramatic program entitled "Hallmark Playhouse"; a 30-minute dramatic program entitled "Line Up"; a one-hour program entitled "Hear It Now", a summary of the week's news containing recordings of the voices of those who made the news; and a 30-minute quiz program entitled "We Take Your Word."

995 140. The following are some examples of exclusive programs of Station WHOL, that is, programs which have not been broadcast by any other station in Allentown or Bethlehem at any time: a 30-minute broadcast including an address by President Truman from his train platform at Allentown on the occasion of the first visit of a President of the United States to Allentown in more than 30 years; a discussion of civic problems direct from the Jewish Community Center; and an hour long broadcast of the traditional Reformation Day service from the Emanuel Evangelical and Reformed Church. All of the Reformed churches in Allentown and vicinity, including 23 congregations, participated in these services with a mass choir from all congregations and a speaker of national or international renown taking part. Station WHOL broadcast these services exclusively in 1948, 1949 and 1950. Other exclusive local programs of Station WHOL are a public forum broad-

cast from a local theater on a proposed reassessment of real estate values; also an hour or more combined Christmas program of Cedar Crest and Muhlenberg Colleges direct from the Muhlenberg College chapel, in 1948 and 1949; and a one-hour program on the Moravian Virgils, a Christmas Eve service dating back to the 18th Century, in 1949. During the Christmas seasons of 1948, 1949 and 1950, the Cedar Crest College Choir was broadcast through Station WHOL to the Columbia Broadcasting System network, and also on at least two occasions to the Voice of America. A joint recital of the Cedar Crest College Choir and the Lehigh University Glee Club, which usually takes place twice a year, has also been broadcast by Station WHOL. Musical programs of Cedar Crest College are being broadcast over no other local station at the present time, although the school could use additional facilities. The Cedar Crest College Choir has never broadcast over any of the other stations in Allentown, except on one occasion over an FM (WFMZ) station. Station WHOL is the only station in the community that has been active in extending its facilities to such college.

141. Other exclusive programs over Station WHOL include a one-hour Christmas mass from St. John's Greek Catholic Church in Northampton; a discussion from the studios of Station WHOL on local tax problems; a 30-minute program of the 19th Street Men's Bible Class; a half-hour broadcast of the charter night ceremonies of the Allentown Barber Shop Quartet Society; a 2-½ hour Good Friday program presented in cooperation with the local Ministers League; a 1-hour Easter Mass from the St. John's Greek Catholic Church in Northampton; a 1-½ hour discussion of local tax problems direct from the Jewish Community Center; a one-hour program of the St. John's Music Festival, an annual spring event from the St. John's Lutheran Church; a 45-minute program from West Park of an annual ceremony relating to the naturalization of

996 many local citizens of West Park; a 30-minute program by the Allentown Band; a 1-¼ hour broadcast of the Reformation services from the Zion Reformed Church; a 1-hour program of the annual Hallowe'en parade; a 15-minute discussion of tax problems by city councilman.

142. Other local programs broadcast only by Station WHOL include a 1-¼ hour program of the Knights Templar induction ceremonies; a 1-hour program of sacred music from St. John's Church in Allentown; two 1-hour broadcasts from the St. John's Greek Catholic Church mass direct from the church in Northampton; three 30-minute broadcasts of a revival sponsored by local ministers direct from the Mizpah Grove Tabernacle; a 45-minute broadcast of the Zion Church Reformation Day services direct from the church; a 15-minute program on behalf of the Golden Age Christmas Tree, a seasonal charity event; a 15-minute broadcast from a local theater presented in cooperation with the City Recreation Commission, awarding recognition to the Municipal Opera Company; a ½-hour broadcast from the Jefferson Elementary School during its Christmas program; a one-hour broadcast of the St. James Christmas Eve service direct from St. James Church; and a 30-minute tape-recorded Christmas morning program from the First Brethren Church.

143. In addition to the exclusive public service programs of Station WHOL hereinbefore discussed, the station has broadcast a number of other public service programs which were not actually broadcast by other stations, but were not considered exclusive by Station WHOL because other stations had broadcast similar programs.

144. Station WHOL encourages the development of local talent, particularly through the medium of furnishing time for the broadcast of programs. Another example is that of having a junior sportscaster appear on and announce some of a sports program, as a talent development

project. Groups are continually given opportunity to broadcast and encouraged to do so. In this connection, Station WHOL originated a number of programs for the local public elementary and high schools, including a 45-minute a cappella choir of the Allentown High School which was broadcast from the local high school, and Christmas season programs broadcast direct from Allentown High School and from some of the grade schools. The station is currently broadcasting a weekly program in cooperation with the public school system, utilizing talent from the schools and in the past has broadcast spelling bees direct from the schools. From February to June of 1950 a weekly scholastic program direct from the classrooms or auditoriums of the schools was broadcast.

997 145. Station WHOL does not sell time for religious broadcasts, either locally or nationally. However, time for a daily devotional program, and for broadcast of Sunday church services is furnished on a sustaining basis; charge being made for the lines and for wages of engineers on the Sunday morning services which originate at different churches. These combined charges amount to slightly more than $11 per broadcast. The morning devotional program on Station WHOL is broadcast from 7:05 to 7:15 daily. These morning devotional programs are rotated on a weekly basis among members of the Ministers League of Allentown and vicinity who wish to participate and have been on Station WHOL since about the time it first went on the air. Since about the middle of 1949 Station WHOL has made free time available from 11 to 12 each Sunday morning for these local church services. These broadcasts are also arranged, on a rotation basis, through the Ministers League. Station WHOL is the only station in Allentown which is furnishing time to the Ministers League at the present time.

(a) Rev. Willis D. Mathias, a minister with the Emmanuel Evangelical and Reformed Church in Allentown, testified at the hearing. He has been a member of the local

Ministers League for about 22 years and twice served as president of the organization. He has also served as chairman of the League's radio committee for a number of years. He testified that when Station WHOL went on the air it "gave very graciously" of their time. Time for the morning devotional programs was first provided and later time for the broadcasting of the Sunday morning church services was made available, on a rotation basis.

(b) Reuben D. Bollmann, minister of the Calvary Moravian Church in Allentown and also chairman of the Radio Committee of the Ministers League of Allentown and vacinity testified that station WHOL has made time available to the churches for religious broadcasts. Sustaining time is given for daily early morning devotional programs and an hour on Sunday for the broadcasting of church services. These devotional programs are rotated among the ministers who wish to participate and are either live from the studio or by means of recordings made by the station at a time and place convenient to the participating minister. The church service broadcasts originate at different churches and are rotated among the participating churches on a basis of four Sundays at a time. Station WHOL is the only station which now furnishes facilities to the Ministers League and during the period of Reverend Bollman's period of service no other radio station has offered him radio facilities. The Ministers League had a program over station WSAN for a number of years but the program was terminated by that station.

998 (c) Charles L. Miller, minister of the Bethel Mennonite Brethren in Christ, Allentown, testified that the facilities of Station WHOL have been extended to his congregation "very generously." Reverend Miller recounted numerous religious services broadcast by his church over the facilities of Station WHOL on a sustaining basis. While no station has refused him time, no other station has offered Reverend Miller any particular time and his

church now broadcasts exclusively over Station WHOL. He had been broadcasting a 30-minute program regularly over Station WHOL since January 1950. These programs consist of sacred songs and music produced by a group of from 50 to 75 persons, a short sermon, and a prayer. In addition to his regular weekly broadcasts, he has appeared on several of the programs produced under the auspices of the Ministers League, and has been provided free time by Station WHOL for various special events, including half-hour broadcasts of camp meeting services from Mizpah Grove on six Sundays in July and August 1950.

146. Since March 1950 Station WHOL has made free time available every Monday night from 10:30 to 11 p. m. for the Jewish Hour presented under the auspices of Congregation Keneseth Israel, Allentown. About three months after the Jewish Hour on Station WHOL was started, Station WSAN of Allentown began a Jewish program on Friday afternoons beginning at 1:15 or 1:30 but the program has since been discontinued. Station WAEB of Allentown carries a network program of the Mutual Broadcasting System entitled "The Message of Israel", which is of interest to members of the Jewish faith.

(a) Louis M. Youngerman, Rabbi of Congregation Keneseth Israel, testified that he has for the past year conducted a combination musical and prayer service with a brief sermonette ranging from eight to twelve minutes for which the facilities of Station WHOL are given to him without charge. (This program is the one referred to above.) The program is conducted in English except for occasional prayers in Hebrew. Rabbi Youngerman expressed pleasure at the number of requests for copies of either the prayers and the sermons or general information concerning the Jewish religious faith which he had received, many of which were from persons other than members of his own faith. For example, he mentioned particularly requests for copies of sermons from Macungie, Catasauqua and Mauch

Chunk, communities with almost no Jewish population. He does not conduct a program over any of the other stations in Allentown or its vicinity and to the best of his knowledge there are at the present time no other local Jewish radio programs in Allentown or vicinity. He has been in
999 the community about fourteen months and very shortly after he came to Allentown, Station WHOL approached him and offered him the facilities of their station for the program and no other station has offered radio facilities. He has not requested the facilities of any other station. He estimated that there are approximately 4,000 Jewish people in Allentown; and, while he did not have the figures for Bethlehem, estimated that it has about half as many as Allentown.

147. In addition to the religious programs already mentioned, Station WHOL broadcasts a transcribed drama in serial form for the Church of Jesus Christ of Latter Day Saints on a weekly basis, a transcribed religious drama for the Catholic Lay Order of St. Francis on a weekly basis, a transcribed program for the First Church of Christ Scientist on a weekly basis, and occasionally other events of a religious nature.

148. Analysis was made by the Allentown applicant of the programs of Station WHOL, Allentown; Station WSAN, Allentown; Station WKAP, Allentown; Station WAEB, Allentown, and Station WGPA, Bethlehem, for the week of January 14, 1951 in order to determine what percentage of time Station WHOL was broadcasting the type of program not being broadcast at the same time by any one of such other stations; by one of the other stations; by two of the other stations; by three of the other stations; and by all of the other stations. The program classifications used in the comparison were popular music, Western music, concert-symphonic music, polka music, news, sports, farm news, talks—discussion-interviews, weather news, drama, comedy, variety, audience phone quiz, women, chil-

dren and religion. According to this analysis, during 59.87% of the total time during such week Station WHOL was broadcasting a type of program not being simultaneously broadcast by any of the other stations;[43] during 21.79% of the total broadcast time for the week, only one other station was broadcasting the same type of program as was being broadcast by Station WHOL; during 12.51% of the total time for the week, two other stations were broadcasting the same type of programs then being carried by Station WHOL; during 5.8 % of the total time for the week, three of the other stations were broadcasting the same type of program as Station WHOL; and at no time during the week did all four of the other stations broadcast the same type of program as Station WHOL.

1060 149. Station WHOL did not broadcast any of the actual events at the Allentown Fair in 1950, but did publicize the Fair through spot announcements. Similarly, actual events of Old Home Week, which was inaugurated in Allentown in September 1950, were not broadcast but the station helped to publicize the plans for the week. Moreover, the mayor testified that the station cooperated with him in connection with the Old Home Week project and that he spoke over the station regarding the plans for the celebration.

150. Station WHOL subscribes for the wire news service of United Press and uses that service for a substantial portion of its local news coverage since the station does not employ a regular news reporter. All of its news programs are classified as either network or wire under the Commission's definition of types of programs.

151. Humboldt J. Greg, the president and general manager of the licensee of Station WHUM, intervenor in this proceeding, testified on behalf of the Easton applicant with

[43] Witnesses from Stations WAEB and WGPA disagreed with the categorization of a few of their programs. These differences do not substantially affect the percentage figures.

respect to a Pennsylvania Dutch Festival held in Kutztown, Pennsylvania in July 1950. This four-day festival was publicized by the Allentown stations to the extent heretofore shown in the findings relating to programming of the respective stations. This witness also testified that recordings were sent out to various radio stations and it is his belief that several stations, including Station WAEB in Allentown, carried one or more of these recordings; that it is his understanding all stations in the area were contacted but he did not specifically remember sending material to any specific station. In addition to those recordings, live talent broadcasts originated from the Fair Ground at Kutztown which were picked up by a station in Reading and offered to various other stations, and another Reading station had "certain live broadcasts from there on a recorded basis." Station WAEB, Allentown, a station in Harrisburg and one in Lancaster also carried some of the festivities. There were no origination charges and the broadcasts were available to any station that wanted them and would pay the line cost. Station WHOL carried one 15-minute program from the festival—a special program by Pumpernickel Bill.

152. Donald V. Hock, who is now and has been since November 1947 the mayor of Allentown, testified that the facilities of Station WHOL have been made available to him as mayor at various times and that he has used them. He mentioned a series of tape-recorded 15-minute progams relating to problems pertaining to the city which were broadcast weekly for eight to ten weeks on Saturday morning. The mayor also used the facilities of Station WHOL in connection with Old Home Week held in August 1950. In addition, Mr. Hock discussed the interest of the public generally in several programs broadcast by Station WHOL, including the address of President Truman on his visit to Allentown on October 7, 1948; a public forum which was conducted by the home and property owners of

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Allentown for the discussion of reassessments of real estate which originated at a local theatre; the Christmas music programs of the local churches and colleges; the broadcast from a men's Bible class which meets each week for a one-hour non-denominational religious service and has an attendance of several hundred persons; and the presentation of the Municipal Opera Company award. The mayor has used the facilities of the other local stations, but not to the extent he has used those of Station WHOL.

153. Wilbur William Hollman, head of the music department, Cedar Crest College and also a director of music at Salem Evangelical and Reformed Church, testified the facilities of Station WHOL have been extended to the college without charge, the station maintaining a line from the station to the college auditorium. Numerous musical programs have originated from the college auditorium, including programs heretofore mentioned, which have been short-waved by the Voice of America network, as well as fed to the Columbia Broadcasting System network. In connection with the broadcasts of its choir, the college has received mail from East Africa, Haiti, the tip of South America, and Iraq, as well as from some twenty of our own United States. These programs are hereintofore discussed in more detail in connection with the program service of Station WHOL. While the witness thinks it may be possible to use some of the facilities of other local stations, Station WHOL, to the best of his knowledge, is the only standard broadcast station which has ever extended their facilities to the college.

154. Several sessions of the 1951 hearing were held in both Easton and Allentown and all persons who desired to testify with respect to either applicant or city involved, or with respect to the needs for radio service in the respective areas were welcomed. The testimony of the public witnesses who appeared is reflected in the foregoing findings.

Conclusions

1002 1. Easton Publishing Company and Allentown Broadcasting Corporation are applicants for standard broadcast stations to be operated upon the frequency 1230 kc in Easton and Allentown, Pennsylvania, respectively. The simultaneous operation of the proposed stations would result in mutually prohibitive interference, and, thus, only one of the applications can be granted.

2. These two applications have been the subject of extended hearings before this Commission, as well as proceedings in the United States Court of Appeals for the District of Columbia Circuit, and the evidence in the combined record of the original hearing in 1946 and the further hearing in 1951 is the basis of this decision. The further hearing was upon issues designed, among other things, to adduce evidence upon which to predicate the findings required by the U. S. Court of Appeals for the District of Columbia Circuit when it remanded the case as the result of the appeal taken by Easton Publishing Company from the action of the Commission in denying its application and granting that of the Allentown Broadcasting Corporation. The Court of Appeals, in its decision remanding the case for further proceedings, affirmed the conclusions of the Commission upon all points at issue except with respect to "the comparative needs of the two communities for new radio service and the relative abilities of the two applicants to serve the greater need."

3. The Commission has already concluded, and been affirmed on that point by the appellate Court, that the Allentown Broadcasting Corporation and its stockholders, officers and directors, as they existed at the time of the 1946 hearing, possess the necessary qualifications to become a licensee of a radio station. However, changes have since occurred in the capital structure and the ownership of the stock of the Allentown Broadcasting Corporation and in its officers and directors, as reflected in the amended appli-

cation of Allentown. The principal stockholder at the time of the 1946 hearing has disposed of 58 shares of stock, and and additional 368 shares of stock have been issued and are now outstanding. Newcomers to its present roster of stockholders include Hilda M. Deisroth, E. H. Witney, George M. Chisnell and Victor C. Diehm (also vice president and director of the corporation), who hold an aggregate of 46.8% of the presently issued and outstanding Allentown stock. The evidence in this record shows that these four persons, and each of them, possess the necessary qualifications to become a licensee of a radio station. The legal, technical, financial, and other qualifications of this applicant, and its officers, directors and stockholders owning in excess of 95% of its presently issued and outstanding stock, have been established in this record. We, therefore, conclude that the Allentown Broadcasting Corporation
1003 is legally, technically, financially, and otherwise qualified to become the licensee of the radio broadcast station proposed in its application here under consideration.

4. Since the 1946 hearing, changes have occurred in the officers and directors, and in the record ownership of slightly in excess of 50% of the stock of the Easton Publishing Company; and the Easton application also has been amended to reflect the present stock ownership and corporate officials. These changes include the transfer of 3,732 shares (46.65%) from Chester Snyder, now deceased, to his widow and sons; the transfer of 200 shares (2.50%) from the First National Bank and Trust Company to J. L. Stackhouse (100 shares) and to the trustees under the will of J. H. McGrath, deceased (100 shares); and the transfer of 84 shares (1.05%) from the executors of the estate of J. H. McGrath to trustees named under his will. Approximately 51.56% of the Easton stock was held [illegible]ust at the time of the 1946 hearing, and a net additional 15.35% of the stock

has been placed in trust since that time.[1] At the present time an aggregate of 66.91% of the stock of the Easton Publishing Company is held in three trusts, A trust established by the will of H. J. Steele, holds 3,925 shares (49.06%), of which the trustees are Adele S. Fretz, his daughter, and the Easton National Bank. The stock in this trust may be sold at any time by the trustees, and if sold, the proceeds are to be distributed to various religious, educational and charitable organizations upon the death of Mrs. Fretz. The only beneficial interest that Mrs. Fretz has in the trust is her right to receive the income therefrom for life. A trust established by the will of Chester Snyder holds 1,244 shares (15.55%), of which his widow, Anna M. Snyder, and a son, Daniel W. Snyder are the trustees. Edward Snyder, another son, receives the income of this trust during his lifetime. These trustees may dispose of the stock at any time they deem it advisable, and if not sold prior thereto, it is to be distributed upon the death of Edward Snyder among certain Easton institutions and the widow and son Daniel, or their heirs. A trust established by the will of John H. McGrath holds 184 shares (2.3%), the trustees of which are his daughter and son. His widow receives the income of this trust during her lifetime. These trustees may also sell the stock at any time they deem it de-
1004 sirable and, if not sold by the time of the death of the widow, the corpus of the estate is to be divided equally among the children of John H. McGrath. While the Commission has heretofore indicated, in actions upon other applications, that there may be serious doubts as to whether broadcast stations should be licensed under conditions where responsibility for management would be placed in the hands of trustees without beneficial interests, we do not

[1] In 1946, 2.5% of the stock was held by the First National Bank and Trust Company of Easton in two trusts, apparently as collateral for indebtednesses to the bank by the equitable owners. Since then 100 shares (1.25%) of this stock has been transferred by the bank to J. L. Stackhouse, the then equitable owner, and the other 100 shares (1.25%) is now held by the daughter and son of the former equitable owner, as co-trustees of another trust.

feel that the facts and circumstances surrounding the trusts in this case raise such doubts. The legal, technical, financial, and other qualifications of this applicant, and its officers, directors, and stockholders owning in excess of 97% of its stock, have been established in this record. We, therefore, conclude that the Easton Publishing Company is legally, technically, financially, and otherwise qualified to become the licensee of the radio broadcast station proposed in its application here under consideration.

5. The cities of Allentown and Easton are respectively the hub of separate communities even though they are located in the same metropolitan area. The 1940 metropolitan community, denominated Allentown-Bethlehem-Easton Metropolitan District, had a population of 325,142; whereas, the 1950 metropolitan community, denominated the Allentown-Bethlehem Standard Metropolitan Area, has a population figure of 438,000. Easton had a population of 33,589 in 1940 and 34,410 in 1950; and Allentown had a population of 96,904 in 1940 and 106,233 in 1950. Thus, during the 1940-1950 decade the population of Easton increased by 2.4% and that of Allentown by 9.6%, four times the rate of the Easton increase. In this connection, it may be noted also that the population of Easton has remained somewhat constant for the past three decades, slightly increasing or decreasing. from Census to Census, while that of Allentown has steadily increased at a healthy rate until Allentown is now almost three times the size of Easton populationwise.

6. The presently existing radio broadcast transmitting facilities in the city of Allentown are: Station WSAN which operates on 1470 kc, with 5 kw power, unlimited time, and is affiliated with the network of the National Broadcasting Company; Station WAEB which operates on 790 kc, with 500 watts power during the daytime and 1 kw power at night, and is affiliated with the network of the American Broadcasting Company; and Station WKAP which oper-

ates on 1320 kc, with 1 kw power, unlimited time, and has no network affiliation.[2] The presently existing standard broadcast transmitting facilities in the city of Easton are those of Station WEST which operates on 1400 kc, with 250 watts power, unlimited time, and is affiliated with the networks of both the National Broadcasting Company and the Mutual Broadcasting System. The city of Bethlehem which is located between Allentown and Easton, and immediately adjacent to Allentown, has standard broadcast Station WGPA which operates on 1100 kc, with 250 watts power, during the daytime only. In addition to these standard broadcast stations, each of the communities has FM broadcast transmitting facilities. Allentown has two FM stations, Easton has two such stations, one of which is operated by the Easton applicant, and Bethlehem has one.

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7. In view of the fact that only one of the applications can be granted, it is necessary to weigh comparatively the two proposals.[3] In the light of the remand of the Court of Appeals "for findings upon the comparative needs of the communities for new radio service and the relative abilities of the applicants to serve the greater needs," consideration will be given not only to the needs of the respective communities but also to the relative abilities of the respective applicants to meet that need, as disclosed by their past deeds and future plans.

8. The proposed Easton station would render primary service within its normally protected contour during the daytime over an area of about 900 square miles wherein 212,479 persons reside. It would receive objectionable interference within such normally protected contour affect-

[2] At the time of the hearing, Station WKAP operated daytime only, but had authorization for full-time operation.

[3] At the time of the original hearing there were four applicants for the facilities here under consideration, two in Easton and two in Allentown; at the time of the decision of the U. S. Court of Appeals there were three applicants, two for Easton and one for Allentown; and at the present time only two applicants remain, one for each community.

ing slightly in excess of 1% of the population within the remaining interference-free contour. This interference population percentage is well within the 10% tolerance permitted by the Commission's Standards of Good Engineering Practice. The area within the normally protected daytime contour which would receive interference receives substantially the same service as does the interference-free area within that contour. At night, the proposed Easton operation would be limited to its 18.1 mv/m contour which encompasses an area of 23 square miles with a population of 57,057. The proposed operation would render primary service, both day and night, to the city of Easton; and, in addition would render primary service during the daytime to the cities of Phillipsburg, Wilson borough and Nazareth, as well as to a portion of the city of Bethlehem. A
1006 minimum of twenty-four stations [4] presently render primary service during the daytime to all or a part of the rural portion of the daytime service area of the proposed Easton station: At least five stations, including affiliates of the four major networks, serve all of such area; two other stations serve almost all of the area; two others serve in excess of 70%, four others serve 50% or more thereof, and eleven others serve lesser portions thereof. Among the stations serving substantial portions of the area are Station WEST, Easton, Stations WSAN, WAEB and WKAP, Allentown, and Station WGPA, Bethlehem, all located within the metropolitan area of which Easton is a part. Not less than two stations (WEST, Easton, and WOR, New York City) and likely two others (WGPA, Bethlehem, and WSAN, Allentown) render primary service to urban areas, including the entire city of Easton, during the daytime. At night, the entire city of Easton receives primary service from Stations WEST and WOR and each of such stations places a 2 mv/m signal over, at least, the entire urban portion of the proposed

[4] The computations of the engineering witness for Allentown show this figure to be 27 stations.

nighttime interference-free contour and a 0.5 mv/m signal or more over all of the rural portion thereof. In addition, five other stations render primary service to the rural portions of the nighttime service contour.

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1007 11. While the Commission in its order of February 16, 1950 did not specifically require the Easton Publishing Company to bring its application up to date, it did put that applicant on notice that it should disclose any and all changes in its present plans which were at variance with its application. The Easton applicant elected to amend its application only with respect to changes in its stock ownership, officers, and directors. It now appears from the testimony of its consulting engineer that changes in the equipment specified in the application may be necessary or desirable. While it is represented that the equipment and installation will meet the requirements of the Standards of Good Engineering Practice, we are unable to ascertain from the evidence in this record whether, in the event of a grant of the Easton application, the equipment which would be installed would conform to that specified in the application.

12. The proposed Allentown station would render primary service within its normally protected contour during the daytime over an area of 939 square miles wherein 314,461 persons reside. It would receive objectionable interference within such normally protected contour affecting population equal to less than 1% of the population within the remaining interference-free contour. This interference-area population percentage is well within the 10% tolerance permitted by the Standards of Good Engineering Practice. The interference area presently receives substantially the same service as does the remaining interference-free area. At night, the Allentown station is limited to its 18.2 mv/m contour which encompasses an area of 28.6 square miles with a population of 91,690. The proposed op-

eration would render primary service to all of the city of Allentown during the daytime and to 89% of the city, both area and populationwise, at night. During the daytime the Allentown station would also render primary service to the entire cities of Bethlehem, Catasauqua, Coplay, Emmaus, Fountain Hill, Hellertown, Northampton and North Catasauqua, each having population in excess of 2,500. Twenty-five stations presently render primary daytime service to all or a part of the rural portion of the daytime service area of the proposed Allentown station: At least seven stations, including affiliates of the four major networks, serve all of such area; four other stations serve more than 90%, three others serve 40% or more, and eleven others serve lesser portions thereof. Among the stations serving substantial portions of such rural areas are included the three Allentown stations and the Bethlehem station, only one of such stations serving all. Nine stations render primary service to portions of the urban areas of the primary service contour of the proposed Allentown station during the daytime, two of which serve substantially all thereof. The entire city of Allentown receives a
1008 2 mv/m or better signal from six stations during the daytime, including the three Allentown stations, the Bethlehem station and two Philadelphia stations. At night, two Allentown stations and one Philadelphia station deliver a 2 mv/m or better signal to all of the city of Allentown and the other Allentown stations deliver such a signal over a substantial portion thereof.

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1009 15. The installation and equipment proposed by the Allentown Broadcasting Corporation meet the requirements of the Standards of Good Engineering Practice, and is in conformity with the specifications contained in the application.

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17. The operation of the proposed Allentown station would furnish Columbia Broadcasting System network programs to Allentown and to eight nearby cities, with an aggregate population of 190,985 persons, based on the 1940 U. S. Census, which do not otherwise receive primary service from a station broadcasting programs of the Columbia Broadcasting System. This population figure would be substantially increased by the use of the 1950 Census figures.

18. Each of the stations would have as station manager a full-time employee who owns no stock in the corporation. The only broadcast experience of the manager of the proposed Easton station is that gained as manager of the applicant's FM station. The manager of Station WHOL had several years of radio experience before he became affiliated with Station WHOL when it first went on the air. The present plans of neither applicant disclose any great degree of integration of ownership and day-to-day operation of its station. No stockholder or officer of either applicant expects to devote full time to station operation. J. L. Stackhouse, the president and general manager of the Eastern Publishing Company and owner of less than 2% of its stock, and Miss McGrath, society editor of the Eastern Express and co-trustee of 2.3% of the corporation's stock, are the only stockholders who participate in the day-to-day operation of the business activities of the Easton applicants, and Miss McGrath's participation is now and will be limited to the newspaper and that of Mr. Stackhouse is and will continue to be devoted very largely to the newspaper. He would, however, be available for consultation on radio matters and be ready to call a board meeting at any time. Mrs. Fretz and Mrs. Snyder, the other officers and directors of the corporation, are not presently active in
1010 the day-to-day operation of either the newspapers or the FM station, and it is not contemplated that they would participate to any greater extent in the

operation of the proposed station. Charles G. Helwig, secretary-treasurer, director and owner of 5.57% of the stock of Allentown Broadcasting Corporation, is a practicing attorney in Allentown, but devotes a substantial amount of time to the over-all operation of Station WHOL and would continue to do so as long as the station requires his services. Victor C. Diehm, vice president and director of the corporation and owner of 11.7% of its stock, has wide experience in radio station management and expects to spend all or a part of one day each week in Allentown in consultation with other officers and directors of the corporation, and the station manager, relative to the plans and problems of the station. We conclude that while the radio experience of the Allentown management and the integration of ownership and operation of the Allentown station would be slightly greater than that of the Easton applicant, the difference is not of a compelling degree.

19. Since both of the applicants possess, at least, the bare qualifications for a licensee referred to by the appellate Court, we come now to a comparison of their qualifications and abilities as shown by past deeds, as well as future plans. The Easton applicant's conduct with respect to the existing standard radio Station WEST at Easton is an item which must be considered. This applicant which publishes the Easton Daily Express, the only daily newspaper in Easton, did not carry the program logs of the local station (WEST) until the newspaper's own FM station went on the air and it began the publication of the program logs of that station in the newspaper. This, in spite of the fact that the newspaper regularly carried the program logs of the New York City network stations. This action with respect to Station WEST is not easily reconciled with the admission of the president and general manager of the corporate applicant that he considers the program logs of a local radio station of public interest in the community. Whether or not it may be considered a definite policy on the part of the newspaper to exclude or minimize mention

of Station WEST in the news columns of the paper, the evidence in this record indicates that the projects and activities of Station WEST, or at least the connection of Station WEST with such activities, have not often been considered newsworthy enough for publication in the news columns of the paper. Station WEST purchases substantial space advertising in the newspaper but the newspaper does not advertise over that station. On the other hand, FM Station WEEX is given space and publicity in the newspaper columns without charge; and, in turn, the newspaper is advertised over the FM station without charge, in addition to identification as the newspaper's station when it signs on and signs off the air, and at station breaks.

1011 20. Although the management of the Easton Publishing Company testified that its newspaper and radio activities are "separate operations", the preponderance of the evidence in the record does not support the conclusion that they are or would actually be separate operations, even though there would be no joint advertising rates or efforts. The attitude of the newspaper toward the proposed radio station is, we believe, well epitomized by the testimony of the man who would be in charge of the day-to-day operation of the proposed station, as its general manager. This witness who has been employed by the applicant for more than sixteen years volunteered the reason for his assignment to "this phase of the Easton Publishing Company activities" as the fact that he had thought for many years "that a radio station would be a very, very valuable complement to our newspaper activities" and had at various times "tried to sell our people on the idea. So, when they decided to go ahead with the project, why, they looked to me to do it." It is a well established principle that a radio station is licensed to serve the public and not for the purpose of furthering the private interests of individuals or groups of individuals.

21. The Commission has in the past entrusted both of these applicants with radio broadcast facilities. Those of

the Easton applicant are for the operation of a frequency modulation station and not for amplitude modulation operation such as now requested. Those of the Allentown applicant are the identical facilities involved herein, the grant of which was remanded by the appellate Court for further proceedings which are now under consideration. In a comparative proceeding such as this, we consider, in an appraisal of applicants, the stewardship rendered for facilities entrusted to them, even though under unusual circumstances and for facilities of different types of broadcasting. Here we have two applicants, each of which has legally constructed and operated a radio broadcasting station in its respective community under the duty and responsibility of rendering the best possible service to the public over such station.

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1013 23. From the time the Allentown station went on the air in September 1948 through December 1950, Station WHOL broadcast a total of approximately 2,480 public service programs (an average of more than 88 monthly), aggregating about 731 hours of broadcast time, and a total of 7,488 (an average of 312 monthly) non-commercial spot announcements, for various local non-profit organizations of a civic, religious, charitable, educational governmental, fraternal and like character. The number of organizations participating in these programs totals about 145. The station broadcasts network programs of one of the major networks and has at times originated programs of a local college musical group for broadcast over the national hook-up and for short wave overseas broadcast. The station has sought out program sources and assisted in the development of many programs of public interest, including discussion programs, religious programs of the different faiths, etc.

24. This record contains detailed information with respect to the actual program service being rendered by the

existing stations in both Easton and Allentown and exhaustive findings have been made thereon. In addition, the program service of the Bethlehem station is shown in the same detail and also reflected in findings hereinbefore made.

25. According to the testimony of the manager of Station WGPA, Bethlehem, that station has not geared its program service to any community outside of Bethlehem, although it has in the past broadcast a few public service programs of Allentown groups. As an advertising medium, the station serves primarily the merchants and other business activities of Bethlehem. It is a daytime-only station and its program service is predominantly sports and recorded music.

1014 26. Station WEST is the only standard broadcast station that purports to carry programs designed for or originating in Easton. It carries a variety of commendable programs, both local and network, and cooperates in activities and projects for the Easton communities. The record contains detailed evidence with respect to its program service and extensive findings have been made thereon. (Paragraphs 81-87, both inclusive, of the findings) The station has been both active and effective in many local drives and has cooperated with numerous civic and governmental organizations. While its policy is to cover "in the fullest manner and to the greatest extent" any program that the station believes of a public service nature, the evidence discloses that many local civic events are recorded and broadcast later; and some athletic contests are broadcast on a recap basis only; and some such events have been broadcast over Station WEST-FM at the time of happening and followed in the evening by a recap over Station WEST. A comparison of the proposed program service of the Easton applicant with that of Station WEST (paragraph 128 of the findings) discloses that a substantial portion of the local public service programs, such as panel discussions, interviews, broadcasts of church services and

other devotional programs, farm programs, Parent-Teachers Association programs, weather reports, service club luncheon speakers, women's programs, veterans programs and news programs proposed by the Easton applicant are very similar to programs already carried by Station WEST. The news gathering facilities of the Easton applicant which would be available to the proposed AM station are much greater than those of Station WEST which depends largely on a wire service for local news. However, the latter station also broadcasts many important network news programs. The music appreciation series of class-room programs now broadcast over FM Station WEEX every other week in cooperation with several rural elementary schools, and which it is proposed to broadcast over the AM station, is a highly commendable program. It is not duplicated by Station WEST. However, it is a well known engineering fact that the primary coverage of an FM station such as Station WEEX is substantially greater than that of a standard broadcast station, such as here proposed, operating in the same area, and the record does not disclose which of the rural schools are located in the primary service area of the proposed AM station. Furthermore, there is no probative evidence to show that the local city schools would participate in such a program. The weekly program by the Easton Players Guild proposed for the AM station does not have any counterpart on Station WEST. The latter station broadcast numerous net-
1015 work dramatic shows, but none which give expression to local talent. Station WEST, the existing station, has publicized productions of the Players Guild which were given in the high school auditorium and not broadcast. The Easton applicant proposes a weekly program by teen-age talent which is not now carried over its FM station even though it was tried in the past and considered "quite successful" at the time. The manager of Station WEST testified that the station had tried in the past without success to get local talent to produce programs of broad

cast caliber and that efforts had also been made to interest the local schools in presenting programs by and for school organizations, also without success.

27. As heretofore mentioned, the Easton Publishing Company has had broadcasting facilities in operation in Easton since 1948 in the form of FM broadcast Station WEEX. It has not carried out over such station, to any substantial degree, the program plans which it outlined for its proposed AM station in the 1946 hearing and then told the Commission it would broadcast over the FM station also, even though it represents it has endeavored to do so. It is now represented, as it was in 1946, that programs will be duplicated over the AM and FM facilities for a very substantial portion of the broadcast day. In fact, the programs now proposed for the AM station are, with few exceptions, identical with those shown by the record for the FM station during the hours when the latter station is on the air. (Paragraphs 112-125(d), both inclusive, of the findings)

28. In the event its application is granted, the Easton Publishing Company represents that it will encourage and develop local talent, cooperate with the public and private educational institutions, and provide time for the various schools. Time will be made available without charge to civic and governmental organizations. The proposed schedule includes many programs which have appeared regularly over the FM station but does not include broadcasts which could not be scheduled because of their seasonal or occasional nature. This is particularly true of sports events (football, baseball and basketball games) which the applicant would continue to broadcast as they occur. Discussion programs would be carried but on a regular, rather than the present irregular, basis. The farm program would be enlarged to include farm agents from two nearby New Jersey counties. (The farm agents from these two counties already appear over Station WEST.) Parent-Teachers Association programs would be scheduled on a regular

basis, instead of occasionally as in the past, over Station WEEX-FM. (Station WEST now broadcasts on a regular basis such a program.) A program by the librarian 1016 of the Easton Public Library would be presented weekly. A daily women's program would be provided in addition to a weekly home economist program. (While it is represented that this latter program presently appears weekly over WEEX-FM on a regular basis, it did not appear in either the 1950 composite week or the sample week of January 14, 1951.) The proposed AM facilities have been offered to the Centenary Junior College at Hackettstown, New Jersey and a weekly drama workshop program by students of that college is on the Easton proposed program schedule. Similar programs have been broadcast over the applicant's FM station. The representative of that college testified that he thinks this college would like to add to its use of Easton radio facilities and hopes it may be possible for the college to maintain a direct wire between Hackettstown and Easton. This college now makes use of FM Station WEEX and has, in the past, used the facilities of Station WEST. The record does not disclose why greater use has not been made of the facilities of Station WEST, even though the witness testified that the college had never been refused time by the latter radio station. The evidence in this record shows that Hackettstown is not within the primary service area of the proposed AM station. The FM station of the Easton applicant has been used extensively by Lafayette College and it is expected that the college would use the proposed AM facilities. Doubt is cast upon a conclusion of any real need for such service by the testimony of the president of the college who said that while he would like to have "more complete listener coverage" of the college events, admitted that the college had had all of the "event coverage we have asked for or wanted" on both FM Station WEEX and AM Station WEST. Religious broadcasts under the auspices of the local ministers' association, including

broadcast of weekly church services from the various church edifices on a sustaining basis, are scheduled, as are week-day morning devotional programs, and vesper meditations on Saturday under the auspices of the Federation of Church Women. Local area newscasts would be featured over the proposed AM station, as they are now over the applicant's FM station. The news collecting force of applicant's newspaper would be available to the proposed AM station, as they are now available to its FM station, in addition to the two reporters now employed specifically for broadcasting purposes. The proposed program schedule includes live programs for almost 25% of its total broadcast time. This does not take into account sports events and other broadcasts of a seasonal or occasional nature.

29. Apart from the representatives of Lafayette College, Centenary Junior College at Hackettstown, New
1017 Jersey, and the representative of the Players Guild, no representative of any group testified at the hearing, and there is no probative evidence in the record to show that any of the other groups for whom programs are scheduled will actually participate in such programs.

30. As hereinbefore discussed, the Allentown Broadcasting Corporation, after receiving a grant as a result of the original hearing in 1946, proceeded to construct Station WHOL during the pendency of the appeal to the U. S. Court of Appeals for the District of Columbia by the Easton Publishing Company. The station which was constructed under proper authority, though in the peril of a reversal of the Commission's decision by the appellate Court, has been in continuous operation since it went on the air in September 1948 and is now operating under special authorization of the Commission. Insofar as this proceeding is concerned, the Allentown Broadcasting Corporation is "merely an applicant among other applicants entitled to no additional rights or privileges." However, we cannot, in weighing its proposed program service to that community, close our eyes to the record of Station

WHOL in furnishing service to the Allentown community under lawful authorization from this Commission any more than we can fail to give consideration to the operation of the FM station by the Easton applicant. Its proposed program plans are more than mere proposals. They are the actual programs now being broadcast in almost all instances. (Paragraphs 129-153, both inclusive, of the findings)

31. Stations WSAN, WAEB, and WKAP are the only existing stations which regularly carry programs designed for or originating in Allentown. The evidence in this record contains detailed information with respect to the program service of the existing stations in Allentown and extensive findings have hereinbefore been made thereon. (See paragraphs 90-94, both inclusive, for findings on program service of Station WSAN; paragraphs 95-100, both inclusive, for findings on program service of Station WAEB; and paragraphs 101-105, both inclusive, for findings on program service of Station WKAP.)

32. An examination of the programs carried by the three above-named existing Allentown stations discloses that, in the aggregate, substantial time is devoted to the categories of entertainment, news, sports, religion and public service programs. Time is also devoted to discussion programs. A substantial portion of the time devoted to religious programs is on a commercial basis and not a great deal
1018 of it is by local religious organizations. Sunday morning church services are broadcast by one station and that on a commercial basis. A very substantial portion of the time devoted to local sustaining religious programs by one station (WSAN) is used by one of the owners of that station. The present special operation of Station WHOL furnishes the only sustaining time which is presently available to the local ministerial association. This includes time for the broadcast of Sunday morning church services, on a rotation basis, and for daily devotional programs and another religious visitation program.

Several minister members of that organization testified that no sustaining time is available to the organization or their individual churches from any other station. A local rabbi testified that his weekly program over Station WHOL is the only local program for the Jewish faith now broadcast in Allentown and that, soon after he arrived in Allentown, a representative of Station WHOL sought him out and offered the sustaining time for the program. There is a Pennsylvania Dutch program over one of the existing stations and another station broadcast portions of the activities of the Kutztown Pennsylvania Dutch Folk Festival last year. There are also daily broadcasts of farm programs, programs for women, children and public schools. One station (WSAN) has exclusive contracts with the local schools for broadcast of ball games. Although one station lists a program for non-profit organizations' announcements, the evidence indicates that the program is not carried at any regularly scheduled time and is sometimes not carried at all.

33. The Allentown applicant proposes a program service which is geared to the needs and interests of the community it would serve and includes many local programs not otherwise available to the community, as well as the network programs of the Columbia Broadcasting System which, too, are not otherwise available to the city of Allentown and several other nearby cities which would receive service. It would be its policy under the proposed operation to provide time, without charge, to all local bona fide organizations of a civic, religious, educational, fraternal, or similar character. The station management would take the initiative in planning programs for such groups, as it has done in the past, and in seeking out events and projects of public interest for broadcast. Almost 60% of its total broadcast time during the sample week of January 14, 1951 was devoted to programs of a type not being carried simultaneously by any other standard broadcast station in either Allentown or Bethlehem. (Paragraph 148 of

1019 the findings.) The station has also carried many local public service programs which were not broadcast by any other station in the area at any time. (Paragraphs 140-142, both inclusive, of the findings.)

34. Although the Easton applicant has offered the proposed program schedules heretofore considered, the evidence in this proceeding is not at all clear as to the program service which it would actually render in the event of a grant of its application. This conclusion is based primarily upon the uncertainty surrounding the question of network affiliation. The Easton applicant has swayed back and forth in the breeze of indecision on this point. It stated in the body of its application that it did not contemplate broadcasting network programs and no correspondence, negotiations, discussions, or understandings had then been had with respect to network programs; but in a footnote in the application it was said that, "Applicant would consider carrying network programs if they should become available and if they were not received in the area and if they would not interfere with applicant's plan to give a complete local service." Subsequently, as disclosed by the evidence in the record of the original hearing in this proceeding, this applicant made tentative arrangements for affiliation with the Mutual Broadcasting System and proposed to carry network programs 63% of the station's total broadcast time. The network programs then proposed to be broadcast were set forth in its program proposals presented at the original hearing. According to the testimony of the proposed station manager who presented the program aspects of the case on behalf of Easton Publishing Company, at both the original and the further hearing, the network programs were not "particularly selected," but were chosen on the basis of the programs which the network "expected to be able to furnish us," and some of such programs, especially some of the daytime ones, were unfamiliar to the witness. At the

further hearing in 1951, the Easton applicant reversed its field and presented a proposed program schedule made up of 75.07% recorded programs, 24.93% live programs, and no network programs. No explanation was given for the change in program plans between the two hearings. In fact, no mention of network programs was made on direct examination of the witness at the further hearing; and when later questioned he displayed an attitude of evasiveness and lack of candor on the subject. (Paragraph 126 of the findings.) Under cross examination, he first testified that the "present plan" is not to have a network affiliation for the proposed station. Later on, after he had testified that commercial religious network programs might be accepted by the proposed station, he was asked to reconcile the two positions and then denied saying that the
1020 Easton applicant did not intend to affiliate with a network but stated that he had said, "We made no overtures at all"; and that there is the "remote possibility that some time in the indefinite future we might affiliate." This is at variance with his previous testimony on the same day. Under further questioning, this witness stated that, "we would have to have something to affiliate before we talk business" and admitted that, in such event, "we would probably see what was available" and "if there was a network that we thought was desirable and available, we would probably call them." The record does not disclose what network programs would be broadcast in the event of a network affiliation, or what programs now proposed to be broadcast would be scrapped to make way for network programs. The Easton applicant has by its own action abandoned the program plans which it advocated at the 1946 hearing and, thus, cannot expect to be permitted again to reverse its field and re-embrace those plans as the basis of network operation. We, therefore, conclude that this record does not disclose with the required certainty the program service which would be rendered by the proposed station at Easton in the event of a grant of the

application of the Easton Publishing Company; and equally, if not more, important, the applicant has not made the frank, candid and honest disclosures on this and other subjects which the Commission has a right to expect of an applicant.

35. The study of this record reveals several other instances where the Easton applicant's principal witnesses, who are the management officials of the company and of the proposed station, have been reluctant, evasive and evidenced a lack of candor in making complete and prompt disclosures of information. An example of this is shown by the testimony of the president and general manager of the company with respect to the circulation of other newspapers in the area. On direct examination he created the impression that the Easton Express has substantial competition from the Allentown and Bethlehem daily newspapers; whereas, on cross examination he admitted that the Bethlehem paper had a circulation of only 59 in the Easton area, the Allentown morning paper of 453, and the Allentown evening paper only one. He first denied any knowledge of the total circulation figures of the weekly newspapers, but when the suggestion was made that they were small, immediately gave the circulation figures of each newspaper. This witness also testified that he did not know the amount of dividends the company had
1021 paid in 1950. It is difficult to believe that a man with the ability to direct the successful operation of a newspaper, who has been with the corporation for 33 years, who is a stockholder in the company and attends regular weekly directors' meetings, who is also the treasurer of the company, who was able to recall the reasons given by a competitive newspaper for suspending publication in 1943, and who was familiar with such operating details as rates of depreciation applied to various types of physical assets of the company, was unable to recall the amount of dividends which he had received during the immediately preceding year. Other examples

of evasiveness and lack of candor on the part of the general manager of the proposed radio station are herein considered in connection with the proposed programming of the Easton station. The Communications Act of 1934 contemplates that an applicant for a permit or license and its officers, directors and management shall establish those qualifications which would make its grant serve the public interest and this, necessarily, presupposes a frank, candid and honest disclosure as to the facts of its qualifications deemed by the Commission essential to enable it to act within its powers. Even though the witnesses' lack of candor and evasiveness, when considered separately and apart from the general context of the testimony, might appear to concern relatively minor matters, when all such testimony is considered and weighed together, the import becomes significant. To paraphrase the language of the Supreme Court in *U. S. v. WOKO*, 329 U. S. 227, acts of evasiveness may be more significant than the facts evaded.

36. In making a determination as to which of the two communities, Easton or Allentown, is in the greater need for another standard broadcast station, we have given effect to the provisions of Section 307(b) of the Communications Act of 1934, as amended. This is not a case in which a city is without local broadcast transmitting facilities nor is it a case where a choice of programs is not available to the residents of both cities. The mere fact that there are three stations in one city and one station in the other is not controlling in reaching a determination on the comparative needs of the two communities. Assuming for the moment that there is a mathematical relationship to the question to be decided which we do not admit, the population of the two cities must be given consideration along with the number of stations. At present Easton, with a population of 34,149, has one standard broadcast station, and Allentown, with a population of 106,233 has three such stations. Thus, the ratio in Easton is one station

1022 to 34,410 persons and in Allentown an average of one station to 35,411 persons. If the Bethlehem station is added to the Allentown stations, the Bethlehem population (66,340) must be added to that of Allentown and, thus, the ratio of stations in the Allentown-Bethlehem community becomes an average of one station to 43,274 persons. While this is an unrealistic approach to the problem, it is little, if any, more so than the approach that simply because a particular city has only one station and another has three, the city with one station has *a fortiori* a greater need than the other. The fact that a city has no radio broadcast transmitting facilities is a highly persuasive factor in a comparative proceeding, but even that is not an all compelling one. The Commission is under the mandate to grant a permit for a broadcast station only "if public convenience, interest or necessity will be served by the construction of the station." *Section 319 (a) of the Communications Act of 1934, as amended.*

37. The over-all evidence in this record clearly shows a greater need for additional radio service in Allentown than in Easton. Moreover, as elsewhere discussed herein, there are serious questions with respect to the reliance which can be placed upon the management of the Easton applicant to operate the requested station in the manner represented, especially with respect to program service.

* * * * * * * * * *

39. In view of our conclusion that the Easton Publishing Company's application must be denied upon other grounds, we need not deal further with such questions as the treatment of the existing Easton station (WEST) by the Easton Express, that applicant's newspaper; the failure of the proposal to comply with the requirements of
1023 the Standards of Good Engineering Practice with respect to coverage of the metropolitan district; and the indicated variance between the application and the evidence with respect to station equipment.

40. After a very careful consideration of all of the evidence in this proceeding, including the number and kind of existing stations, the program service available to each city from existing stations, the need for radio service, and the suitability of the program service proposed by each of the applicants to the city which would be served thereby, particularly as reflected in the foregoing findings and conclusions, we conclude that a more fair, efficient and equitable distribution of radio facilities would be attained and public interest, convenience and necessity better served by the grant of the Allentown Broadcasting Corporation application and the operation of the station proposed thereunder than by a grant of the Easton Publishing Company application and the operation of the station proposed in the latter application.

It Is Accordingly Ordered, This 6th day of June, 1952, that the application of Allentown Broadcasting Corporation Be and it is Hereby Granted and the application of Easton Publishing Company Be and it is Hereby Denied.

Federal Communications Commission

Elizabeth C. Smith,

Elizabeth C. Smith,

(SEAL) *Hearing Examiner*

Released: June 11, 1952,
and effective 40 days thereafter,
subject to Section 1.853 of the
Commission's Rules

* * * * * * * * * *

FCC Form 303
Section I

Form Approved
Budget Bureau No. 52-R016.7

United States of America
Federal Communications Commission

APPLICATION FOR RENEWAL OF BROADCAST STATION LICENSE

(Revised 6-16-48)

File No. BR-2210

Name and post office address of applicant (See Instruction D)
Allentown Broadcasting Corporation
1125 Colorado Street
Allentown, Pennsylvania

Send notices and communications to the following-named person at the post office address indicated: Reed T. Rollo, Kirkland, Fleming, Green, Martin & Ellis, World Centre Bldg - 19th & K Sts. Washington, DC & Charles G. Helwig, 502 Hamilton St. Allentown Pa.

INSTRUCTIONS

A. This form is to be used in all cases when applying for Renewal of Broadcast Station License. It consists of this part, Section I, and the following sections:

Section II, Renewal Application Engineering Data

Section IV, Statement of Program Service of Broadcast Applicant

B. Prepare and file three copies of this form and all exhibits and swear to one copy. File with Federal Communications Commission, Washington 25, D. C.

C. Number exhibits serially in the space provided in the body of the form and list each exhibit in the space provided on the back of this sheet. Date each exhibit and each antenna pattern.

D. The name of the applicant must be stated exactly as it appears on the current license.

E. Information called for by this application which is already on file with the Commission need not be refiled in this application provided (1) the information is now on file in another application or FCC form filed by or on behalf of this applicant; (2) the information is identified fully by reference to the file number (if any), the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to, and (3) after making the reference, the applicant states: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

F. This application must be executed by applicant, if an individual, by a partner of applicant, if a partnership;

1. Renewal requested for following existing facilities

Call letters	Frequency	Channel No.
WHOL	1230 KC	

Power in kilowatts		Minimum hours operation daily
Night	Day	
250	250	Unlimited

Hours of operation

Unlimited	[X]	Sharing with (Specify Stations)	Other (Specify)
Daytime only	[ ]		
Limited	[ ]		

Location of main studio

City	State
Allentown	Pennsylvania

2. Is applicant or any person directly or indirectly controlling applicant, party to a suit in any Federal Court involving the monopolizing, or an attempt to monopolize radio communication directly or indirectly through control of the manufacturer or sale of radio apparatus, by exclusive traffic arrangements, or by any other means, or of using unfair methods of competition? Yes [ ] No [X]
If the answer is "Yes", attach as Exhibit No. a full description of the proceeding, identifying the court and showing where records of the proceeding may be obtained. (See Section 313 of the Communications Act of 1934).

3. Attach as Exhibit No. 1 a detailed balance sheet of the applicant as at the close of a month within 90 days of the date of this application.

4. Is the information shown in Yes [X] No [ ]

vided on the back of this sheet. Date each exhibit and each antenna pattern.

D. The name of the applicant must be stated exactly as it appears on the current license.

E. Information called for by this application which is already on file with the Commission need not be refiled in this application provided (1) the information is now on file in another application or FCC form filed by or on behalf of this applicant; (2) the information is identified fully by reference to the file number (if any), the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to, and (3) after making the reference, the applicant states: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

F. This application must be executed by applicant, if an individual; by a partner of applicant, if a partnership; by an officer of applicant, if a corporation or association; or by attorney of applicant only under conditions shown in Section 1.303, Rules Relating to Organization and Practice and Procedure, in which event satisfactory evidence of disability of applicant or his absence from the Continental United States and authority of attorney to act must be submitted with application.

G. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

Limited ☐

Location of main studio

City Allentown | State Pennsylvania

2. Is applicant or any person directly or indirectly controlling applicant, party to a suit in any Federal Court involving the monopolizing, or an attempt to monopolize radio communication directly or indirectly through control of the manufacturer or sale of radio apparatus, by exclusive traffic arrangements, or by any other means, or of using unfair methods of competition? Yes ☐ No ☒

If the answer is "Yes", attach as Exhibit No. a full description of the proceeding, identifying the court and showing where records of the proceeding may be obtained. (See Section 313 of the Communications Act of 1934).

3. Attach as Exhibit No. 1 a detailed balance sheet of the applicant as at the close of a month within 90 days of the date of this application.

4. Is the information shown in applicant's last Annual Ownership Report (F. C. C. Form 323), and the applicant's succeeding Interim Ownership Reports (F. C. C. Form 323-A) true and correct as of this date? Yes ☒ No ☐

If the answer is "No", attach as Exhibit No. an interim report supplying full information to bring such data up-to-date.

5. Any change in the citizenship of the applicant? Yes ☐ No ☒

6. Is the applicant a representative of an alien or foreign government? Yes ☐ No ☒

7. List below other businesses in which the applicant or any officer, director, or principal stockholder (any person owning 25% or more of applicant's stock) has a 25% or more interest. List also any radio station other than the station which is the subject of this application in which any of the above named persons have any interest, and the nature and extent of their interest in the broadcast station.

See Exhibit # 2

FCC Form 303 — Section I, Page 2

The applicant waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a renewal of its existing license in accordance with this application. (See Section 304 of the Communications Act of 1934)

The applicant represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

All the statements made in the application and attached exhibits are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in the application.

The applicant, or the undersigned on the applicant's behalf, states that he has endeavored to supply full and correct information as to all matters which are relevant to this application and that he has done so as to all matters within his own knowledge.

Dated this 27th day of October, 1951

ALLENTOWN BROADCASTING CORPORATION
(Name of applicant)

By Charles G. Helwig
Secretary-Treasurer
Title

Subscribed and sworn to before me this 27th day of October, 1951

Kathryn Ed Calder
Notary Public
NOTARY PUBLIC
MY COMMISSION EXPIRES JAN. 7, 1955

SEAL
(Notary public's seal must be affixed where the law of jurisdiction requires, otherwise state the law does not require seal.)

My commission expires Kathryn Ed Calder
NOTARY PUBLIC
MY COMMISSION EXPIRES JAN. 7, 1955

EXHIBITS furnished as required by this form:

Exhibit No.	Section and Para. No. of Form	Name of officer or employee (1) by whom or (2) under whose direction exhibit was prepared (show which)	Official title
1	Section 1 Para. 3	Charles G. Helwig (2)	Secretary-Treasurer
2	Section 1 Para. 7	Charles G. Helwig (2)	Secretary-Treasurer

Subscribed and sworn to before

me this 27th day of October, 19 51

Kathryn Ethelyn Carlson
Notary Public
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SEAL
(Notary public's seal must be affixed where the law of jurisdiction requires, otherwise state the law does not require seal.)

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3	Section II Para. 9	Gerard B. Werst (2)	Chief Engineer
4	Section II Para. 11	Gerard B. Werst (2)	Chief Engineer
5	Section IV Para. 5	Charles G. Helwig (2)	Secretary-Treasurer
6	Section IV Para. 7	Charles G. Helwig (2)	Secretary-Treasurer

Exceptions of Chief, Broadcast Bureau of the Federal Communications Commission

The Chief of the Broadcast Bureau excepts to the Initial Decision of Examiner Elizabeth Smith for 160 reasons herein documented. This Initial Decision is so fraught with error—in fact, law, and judgment—that the Commission is urged to review this entire record in the interest of rendering a fair final decision.

The principal task to which the Examiner in this proceeding was assigned was the application of Section 307(b) of the Communications Act to a situation involving two conflicting applications, one for each of two separate and distinct cities. Nevertheless, after a narrative statement of basic facts which drowns the reader in an inconclusive hodge-podge, the Examiner in 112 pages of decision came to grips with the critical consideration with these 21 words: "The over-all evidence in this record clearly shows a greater need for additional radio service in Allentown than in Easton." Why? How? and Which evidence? are questions left unanswered. Not only do the evidence of record and the findings of fact not support this conclusion—it is impossible to tell what evidence and which findings were relied upon. It was not for this that the Circuit Court of Appeals returned this case to the Commission.

1034 In constructing this decision in favor of Allentown, the Examiner has committed fundamental error in misconstruing the Court's opinion remanding the case. This proceeding originally involved four applicants, two for each city, and "relative abilities" in the Court's direction that the Commission make findings "upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need" had real meaning in choosing between applicants once need was established. But the case has

been reduced to one applicant for each city, and comparing relative abilities without first establishing greater need, as the Examiner has done in her Initial Decision, unfortunately misapplies the Court's language. To illustrate, the Commission's attention is directed to Paragraph 18, Page 90, of the Initial Decision where, prior to any judgments on comparative need as between the communities, the Examiner launches a comparison of the applicants on such matters as broadcast experience and integration of ownership with operation—as if these two applicants were competing to serve the same need in the same city. The very order of the conclusions—relative abilities first and comparative need second—demonstrates the error. The relative abilities of competing applicants to serve is meaningless unless the need is first established.

Frankly, the withdrawal of two of the original applicants in this proceeding and the circumstances that new stations have been licensed in Allentown in the intervening five years since the first decision have made this a simple case to decide. The Commission is faced here by competition for additional facilities between two substantial cities, one of which, Easton, has only one station locally
1035 situated against at least three for Allentown. Although other considerations must, of course, enter into a judgment on this contest, the obvious need for a second local medium of broadcast expression in Easton is compelling. However strongly the merits of the case recommend a grant to the Easton applicant, it would be less than candid to fail to recognize the tremendous edge that the Allentown applicant now enjoys—it is lawfully on the air pursuant to Commission authorization and has the benefit of an Initial Decision, erroneous as it may be, on its side.

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1072 92. To Page 71, to the material in the first five lines on that page in which the Initial Decision notes

that "The record does not show what network programs would be broadcast in case a network affiliation which it considers 'desirable and available' should be found by the Easton applicant, or what programs now proposed would be scrapped to make way for network programs." This consideration is improperly taken by the Examiner to be critical in the Initial Decision (see page 100, paragraph 34). It does not fairly recognize that an open mind on network affiliation or any other possible change in programming at a later date obtains, with equal validity, to every applicant for and licensee of a commercial station. The language here excepted to, and its improper emphasis in this Initial Decision, do not sufficiently recognize how desirable it is for a broadcaster or prospective broadcaster to keep programming flexible. And finally, the Initial Decision overlooks the major consideration that the Commission's network rules and policies, the terms of the usual network affiliation, and the applicant's own inclinations (Ex. 79) are all geared to the end that there will be sufficient non-network obligations to permit of accommodation of the applicant's proposals for significant local programs. Examination of the Easton applicant's plans for specific local programs (see Initial Decision, page 71, paragraph 128), reveals approximately 15 hours of such programs already specifically detailed. The Commission may officially note that, network affiliation or not, these fifteen hours of significant local programs may be accommodated in a broadcast week which, the Easton applicant estimates, will approximate 119¾ hours (Ex. 84). The Commission has earlier realistically refused to recognize mutual exclusivity between a network affiliation and a pro-
1073 posal to program to meet local needs in the Lima-Columbus case. *In re Northwestern Ohio Broadcasting Corp., et al.*, 3 Pike & Fischer Rad. Reg. 1945, 1954 (1948).

93. To Page 71, to all of Paragraph 127, since it does not properly reflect the actual testimony on this score. The testimony of record shows that the Citizens Advisory Council was originally proposed for an AM-FM operation which Easton was unsuccessful in securing; that the original plan for a committee proved to be unworkable and that the members of the committee asked that they function as advisers rather than as a committee (Tr. 1694); and that the members of the committee have been, and are functioning as individual consultants rather than as a committee (Tr. 1711-1712). These are actual facts of record, and give a much different impression than the facts stated in, and the tone of, the Initial Decisions Paragraph 127.

94. Pages 71, 71-a, 71-b, 71-c, Paragraph 128. All of this material should be stricken as non-probative. This material is an attempt to show that the Easton applicant is proposing very little not now being offered by existing station WEST. Adding up all the programs listed in this paragraph for the proposed Easton station results in a figure somewhere in the neighborhood of 15 hours weekly out of a total of 119 and ¾ hours weekly which the Easton applicant proposes to operate (Ex. 84). Fifteen hours out of approximately 120 hours does not permit of sound comparison on this very critical consideration. Additionally, the comparison is full of generalities, surmise, and speculation, and hides the principle that even if programs are of the same type, opportunities are doubled for local expression and the communication of new attitudes.

1103 160. To Page 104, Paragraph 40, and to all of the ordering clause on Page 104 for the foregoing reasons.

Under any comparative consideration of the 307(b) question presented in this proceeding, the Easton application must be preferred over that of Allentown. It can reasonably be presumed, as the Commission has previously done in the Lima-Columbus case, that there is a greater

need for a second medium of local expression in Easton than for a fourth in Allentown.

Respectfully submitted,

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By Robert J. Rawson
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1206 **Reply to Exceptions of Chief of the Broadcast Bureau and of the Easton Publishing Company to Examiner's Initial Decision**

The Hearing Examiner's Initial Decision released June 11, 1952, follows nearly seven years of litigation. The Decision consists of 104 pages of documented findings and conclusions culminating in a recommendation that the Allentown applicant, not the Easton applicant, be granted a license for the facilities requested.

The Exceptions filed against this Initial Decision by the Broadcast Bureau of the Commission and the Easton applicant consist of 71 and 89 pages, respectively—containing a total of 269 exceptions. The language used in these exceptions is unprecedentedly contemptuous of the Examiner. The bitterness found in the Easton exceptions may be partially understood, through not condoned, as being the fruit of a long, hard-fought litigation by a financially interested party. The irresponsible charges and insinuations by the counsel for the Broadcast Bureau have not even that mitigating feature.

It is assumed herein that the Examiner rendered her decision in good faith, an assumption which ought not even need be expressed.

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1314 **Decision**

By the Commission: Commissioners Hennock and Doerfer not participating; Commissioner Walker dissenting.

Preliminary Statement

1. This is a consolidated proceeding which originally involved four mutually exclusive applications for authority to construct and operate standard broadcast stations on 1230 kc, with 250 watts power, unlimited time, in two cities in eastern Pennsylvania. The original applicants were: (a) Easton Publishing Company,[1] seeking authorization for a new station at Easton; (b) Associated Broadcasters, Inc. seeking authorization to change the facilities of Station WEST at Easton; (c) Allentown Broadcasting Corporation,[2] seeking authorization for a new station at Allentown; (d) Steel City Broadcasting Company of Bethlehem, Pennsylvania, Inc., seeking authorization for a new station at Allentown. Only the applications of Easton Publishing Company and Allentown Broadcasting Corporation now remain for consideration.

2. The two applications now under consideration in this proceeding have been the subject of extended hearings before this Commission and three appeals to the United States Court of Appeals for the District of Columbia Circuit. The hearings before the Commission have been in two parts: (1) the original hearing in 1946 and (2) the further hearing in 1951. The combined record of the hearings in both years is now before us and the evidence therein is the basis of this decision. The Commission, by an order dated

[1] Sometimes hereinafter referred to as "Easton."

[2] Sometimes hereinafter referred to as "Allentown."

January 30, 1946 and amended on March 13, 1946, designated the then pending applications requesting the facilities here under consideration for hearing in a consolidated proceeding.

1315 The 1946 hearing on these applications was held in Washington, D. C. in May of that year and the record closed on May 15, 1946. WCAU Broadcasting Company, licensee of Station WCAU, Philadelphia, Penn Ivania, participated as an intervenor in the 1946 hearing. On June 23, 1947, the Commission released its Final Decision in which the application of the Allentown Broadcasting Corporation was granted and the other three applications were denied. Petitions for rehearing were denied in a Memorandum Opinion and Order released on March 26, 1948.

3. On June 8, 1948, the Commission granted the application of Allentown Broadcasting Corporation for approval of the transmitter site of Station WHOL. The station commenced operation under program tests on September 3, 1948 and on February 2, 1949, was granted a license for a period expiring February 1, 1952. An application for consent to the relinquishment of the control of the Allentown Broadcasting Corporation by Lewis and Cora Windmuller, through the sale by the corporation of a block of newly authorized stock to George Gartland, was granted by the Commission on March 10, 1949.

4. The Easton Publishing Company had in the meantime perfected an appeal to the United States Court of Appeals for the District of Columbia Circuit from the decision of the Commission denying its application, and both the Allentown Broadcasting Corporation and Associated Broadcasters, Inc. had timely intervened in the appellate proceeding.[3] The Court of Appeals remanded the case to the Commission, on May 4, 1949, for "findings upon the com-

[3] The Steel City Broadcasting Company ceased to be a party to the proceeding by failing to appeal from the Commission's denial of its petition for rehearing; and, in addition, such applicant advised the Commission on June 29, 1949 that it no longer had any interest in the proceeding.

parative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need.'"[4] The opinion of the Court also stated that "upon the other points at issue, the conclusions of the Commission are affirmed."

5. Subsequent to the remand of the case, the applicants then remaining in the proceeding filed various pleadings in endeavors to obtain a final decision without further hearing, including a joint "Motion and Stipulation" filed on June 24, 1949, purporting to bring up to date changes which had taken place with respect to corporate structures, stockholders, officers, and related matters. In addition, the applicants individually filed petitions for supplemental findings during the months of July and August 1949. These were denied and the action thereon embodied in a Memorandum Opinion and Order dated February 16, 1950 in which the Commission set aside its decision of June 14, 1947, reopened the record, and designated the applications for further hearing upon the following issues:

1316 (1) To determine the technical, legal, financial and other qualifications of the applicants, their officers, directors and stockholders, to construct and operate the stations proposed by them, except the legal qualifications of Associated Broadcasters, Inc.[5]

(2) To determine the areas and populations which would gain or lose primary service through the operation of these proposed stations and the character of other broadcast services available to those areas and populations.

(3) To determine the type and character of program service now being rendered to the areas and populations to be served and the type and character of program service proposed to be rendered by the applicants and whether such

[4] *Easton Publishing Co.* v. *Federal Communications Commission*, 175 F. 2d 344 (1949).

[5] The application of Associated Broadcasters has since been dismissed and it is no longer a party.

proposed service would meet the requirements of the populations and areas proposed to be served.

(4) To determine on a comparative basis which of the two communities has the greater need for the radio service which would become available by the assignment of the frequency involved in this proceeding.

(5) To determine on a comparative basis the relative ability of Allentown Broadcasting Corporation on the one hand, or Easton Publishing Company, or Associated Broadcasters, Inc. (WEST) on the other, to meet the greater need so determined.

(6) To determine whether the operations of the proposed stations would involve objectionable interference with existing or proposed broadcast stations and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other broadcast service to such areas and populations.

(7) To determine whether the installations and operations of the proposed stations would be in compliance with the Commission's Rules and Standards of Good Engineering Practice Concerning Standard Broadcast Stations.

(8) To determine on a comparative basis which, if either, of the applications in this proceeding should be granted.

1317 6. When the Commission by its order of February 16, 1950 set aside its decision of June 14, 1947, the effectiveness of the order setting aside the grant was stayed, insofar as it related to the operation of Station WHOL, pending a final decision in this proceeding.[6] In a subsequent Memorandum Opinion and Order, dated May 23, 1950, the Commission characterized this section as ". . . a

[6] The Commission, on January 31, 1952, extended the authorization under which WHOL now operates until August 1, 1954, or until the final decision in this proceeding, whichever is sooner, subject to the express condition that such grant is without prejudice to any action in this proceeding.

discretionary act of grace resulting from the Commission's determination that, as long as none of the other parties to the continuing proceeding would be prejudiced thereby, there was no reason for depriving the listening audience in Allentown of a radio service during the period before the Commission arrives at a new decision. But . . . it is clear that as far as the further hearing is concerned, and the Commission's determination therein, it [the Allentown Broadcasting Corporation] is merely an applicant among applicants, entitled to no additional rights or privileges."

7. In its Order of February 16, 1950, the Commission gave the applicants 20 days in which to file "such petitions as may be appropriate to seek amendment to bring their applications up to date." The Easton Publishing Company thereafter filed a petition to amend its application as to certain corporate matters, which petition was granted by the Commission on April 21, 1951. The amendment to the Easton application reflected a transfer of 3,732 shares (46.65%) of the compnay's common stock due to the death of Chester Synder and the consequent distribution of his holdings. Other phases of the Easton application, pertaining to such matters as program service, engineering, finances, and equipment, were not amended. The amendment submitted by the Allentown Broadcasting Corporation brought up to date the data requested in the original application, as well as furnishing additional information required by the revised application form in use at that time. The amendment also reflected certain changes effected in the minority stock ownership of the corporation and sought Commission approval to carry into effect an executory agreement for transfer of control of the corporation to Victor C. Diehm, Hilda Deisroth, E. H. Witney, and George M. Chisnell, all of Hazelton, Pennsylvania.[7] In a

[7] Earlier, on February 9, 1950, an application for consent to the acquisition of control of the Allentown Broadcasting Corporation by the Hazelton group was filed with the Commission. This application was dismissed on March 13, 1950, without prejudice to the filing of an amendment to the Allentown application.

Memorandum Opinion and Order of May 23, 1950, the Commission granted the Allentown petition for leave to amend insofar as it amended that corporation's application to show its stockholders, directors, officers and other information as of April 10, 1950, and denied the petition insofar as it requested approval of the executory agreement to transfer control to the Hazelton group, as to have approved the transfer would have amounted to "the substitution at this late stage in the proceedings of, what is in effect, an entirely new applicant." The executory agreement with the Hazelton group remains in effect at this time, although its execution is, of course, dependent upon Commission approval of the transfer of control.

1318 8. In the meantime, on March 17, 1950, Easton Publishing Company filed in the United States Court of Appeals for the District of Columbia a petition for Writs of Prohibition and Mandamus directed to the Commission prohibiting the contemplated further hearing and requiring that findings as to be the comparative needs of the Allentown and Easton communities for radio service and the relative abilities of the respective applicants to serve the greater need be made upon the original record; and on March 23, 1950, the Allentown Broadcasting Corporation also petitioned the Court for a Writ of Mandamus requiring the Commission to make supplemental findings of fact upon the existing record. The Court of Appeals denied both of these petitions, on October 23, 1950, holding that "since the Commission in the exercise of its duty has concluded that the original record does not contain sufficient information for a proper determination of the issues before it, the Commission in the instant case is warranted in reopening the proceeding for the taking of additional evidence."[8]

9. Eastern Radio Corporation, licensee of Station WHUM, Reading, Pennsylvania, was given leave, on Feb-

[8] *Easton Publishing Company* v. *Federal Communications Commission*, 185 F. 2d 987 (1950).

ruary 26, 1951, to intervene in this proceeding for the purpose of demonstrating the extent of interference, if any, which would be caused to Station WHUM by the proposed operations at Easton and Allentown; and such intervenor participated in the further hearing with respect to the question of interference with Station WHUM.

10. The further hearing on the issues specified in the Commission's Order of February 16, 1950 was convened by the Hearing Examiner in Allentown on March 5, 1951. The further hearing was in session on March 5, 6, 7 and 8 in Allentown; on March 9, 12 and 13 in Easton; on May 28 and 29 and June 21 and 28, 1951 in Washington D. C.; and the record again closed on the last mentioned date. At the direction of the Examiner, proposed findings of fact and conclusions of law were filed by the two applicants, the Eastern Radio Corporation, and the Commission's Broadcast Bureau.[9] The Examiner released her Initial Decision, on June 11, 1952, and subsequently statements of exceptions thereto were filed by the Easton Publishing Company and the Broadcast Bureau. The Allentown Broadcasting Corporation filed a reply to the exceptions of the Broadcast Bureau and the Easton applicant. Oral argument on the exceptions was heard by the Commission on February 24, 1953, the two applicants and the Broadcast Bureau participating therein.

Findings of Fact

Communities Involved

11. Allentown, Bethlehem, and Easton, Pennsylvania, comprise the three principal cities in the Allentown-Bethlehem-Easton Standard Metropolitan Area, as defined by the 1950 Census.[10] In 1940, the Allentown-Bethlehem-Easton

[9] WCAU, Inc., an intervenor who participated in the first hearing, did not file exceptions to the proposed decision of April 1947 and has not otherwise participated in this proceeding since then.

[10] Only the preliminary 1950 Census reports were placed in the record. The final report having since become available, official notice has been taken of the figures given therein.

1319 Metropolitan District, including parts of Burks, Lehigh, and Northampton Counties in Pennsylvania, a portion of Warren County in New Jersey, and the three principal cities, had a population of 325,142. The 1950 census increased the size of the metropolitan area to include all of Lehigh and Northampton Counties, Pennsylvania, and all of Warren County, New Jersey, and determined the total population of the area to be 437,824.

12. *Easton* is primarily a manufacturing and industrial city, with a population of 33,589 in 1940 and 35,632 in 1950. The contiguous areas of Wilson Borough, West Easton Borough, Glendon Borough, Alpha Borough, and Phillipsburg (the latter two in New Jersey) had a total population of 30,523 in 1940 and 31,164 in 1950. Thus, the Easton area had a population of about 64,112 in 1940 and 66,796 in 1950. Retail business statistics for 1948 show 609 retail establishments in Easton proper, with 937 establishments in the Easton—Wilson Borough—Phillipsburg area. Annual sales on the Easton retail outlets amounted to $58,202,000, and those of the Easton-Wilson Borough-Phillipsburg area totaled $75,444,000. There are some 119 manufacturing plants within the Easton area, mainly engaged in the textile, clothing, and wood and metal products business. Surrounding rural areas produce dairy products, potatoes, grain, and alfalfa. Easton is the site of Lafayette College, a college for men with a student body of approximately 1,500.

13. *Allentown* is an industrial community with a 1940 population of 96,904 and a 1950 population of 106,756. The immediately contiguous city of Bethlehem had a population of 58,490 in 1940 and 66,340 in1950. The Allentown-Bethlehem area thus had a total population of 155,394 in 1940 and 173,096 in 1950. In 1948, Allentown had 1,516 retail stores with total sales of $142,135,000, and Bethlehem had 852 retail stores with sales aggregating $63,359,000. The total

for the Allentown-Bethlehem area in 1948 was 2,368 retail stores with sales amounting to $205,494,000. The largest single industry in the community is the Bethlehem Steel Corporation, and the chief industrial products include motor vehicles, textiles, cement, meat packing, structural iron and steel, clothing, beer, bakery products, cigars, iron castings, machinery and parts, plumbers supplies, and steam fittings. A number of quarries are located in Lehigh County, and agriculture is an important business, with fruit and truck crops, dairy products, poultry and wool being among the more important agricultural products. Allentown is the site of Muhlenberg College and Cedar Crest College for girls, while Lehigh University, Moravian College for Women, Moravian College for Men, and Moravian Seminary are located in Bethlehem.

Non-Engineering Qualifications of the Applicants

14. Although findings have already been made with respect to the qualifications of the two corporate applicants, their officers, directors and stockholders as they were constituted at the time of the 1946 hearing and the Appellate Court has affirmed such findings, one of the issues in the further hearing is the qualifications of the two applicants as they are now constituted and additional evidence
1320 was taken at the further hearing with emphasis on the newcomers to the roster of stockholders, officers and directors of the two corporate applicants.

15. It was stipulated and agreed by counsel at the 1946 hearing, including present counsel for Easton and Allentown, that the questions with respect to general qualifications and moral character contained in the application for construction permit need not be asked unless some counsel had information which indicated an unsatisfactory answer might be obtained; and it was further stipulated that all such questions, if asked, would be answered satisfactorily

by all applicants and their stockholders, officers and directors, unless the contrary be shown on the record.[11]

Easton Publishing Company

16. The Easton Publishing Company is a Pennsylvania Corporation which publishes the Easton Daily Express and is the licensee of FM Station WEEX which went on the air in February 1948. At the time the record in this proceeding was closed, the Company was an applicant for a television station in Easton. Commission records show that this application has been granted and a construction permit was issued on December 17, 1952, but the station has not commenced operations at this time. Neither the applicant nor any of its officers, directors, or shareholders has any interest in any other radio station or applicant for license. At the time of the further hearing, 8,000 of the 10,000 shares of the Company's authorized capital stock (par value of $100 a share) were issued and outstanding. The balance sheet of the Easton Company, dated November, 30, 1950, shows assets (including goodwill, $300,000)[12] totalling $1,698,799.48, of which $699,092.79 are current assets, including $175,248.98 in cash. Current and accrued liabilities, plus reserve for bad debts, total $274,242.22. In recent years, the company has had a net profit in excess of $50,000 a year, and net worth has increased roughly $537,000 over the amount established at the 1946 hearing. The President of the Easton Company, in answer to question by counsel for the Broadcast Bureau, stated that he did not have the figures on the 1950 dividends paid by the Company

[11] The Easton applicant contends that the 1951 hearing was intended to be a *de novo* proceeding and therefore the record of the 1946 hearing should not be considered and the stipulation entered into at that time is no longer in existence. We cannot agree. The Court of Appeal, in reversing the previous decision in this proceeding, remanded the case for *further* proceedings and the Commission then designated the matter for *further* hearing. Thus, it seems clear that neither the court nor the Commission intended that the 1951 hearing be a *de novo* proceeding with the record of the earlier hearing entirely superseded.

[12] This represents the cost of the purchase of a competing newspaper in 1926.

and would not know the size of the dividends per share without checking his records.[13]

1321 17. The present officers, directors and stockholders of this applicant are as follows:

Name and Address	*Office Held*	*Shares*	*Percentage of Stock*
J. L. Stackhouse Easton, Pa.	Pres., Treas. and Director	150	1.8750
Adele S. Fretz Bethlehem, Pa.	Vice-Pres., Sec'y. & Dir.	9	0.1125
Anna M. Snyder Easton, Pa.	Vice-Pres. and Director	1,244	15.550
Daniel W. Snyder Jefferson City, Mo.	.....	1,244	15.550
Adele S. Fretz and The Easton National Bank, Trustees under will of H. J. Steele, deceased.	.....	3,925	49.0625
Anna M. Snyder and Daniel W. Snyder, Trustees under will of Chester Snyder, deceased.	.....	1,244	15.550
Catharine McGrath and John H. McGrath, Jr., Trustees under will of J. H. McGrath, deceased, Easton and Reading, Pa., respectively.	.....	184	2.300
	Total	8,000	100

It is noted from the foregoing tabulation that 5,353 shares, 66.91% of the total outstanding, are held in three trusts. The trustees of all three trusts have the power to dispose of the stock held by such trusts. At the 1951 annual stockholders meeting, Mr. Stackhouse voted his own stock in person and that of the McGrath Trust by proxy; Mr. Fretz voted her own stock in person and that of the Steel Trust by proxy; and Mrs. Snyder voted her own stock in person

[13] The Hearing Examiner considered this "somewhat unusual" because of the familiarity of the witness with the Company's activities and because he recalled such details as depreciation taken on the physical assets of the Company and the reason why a competing newspaper suspended publication in 1943.

and that of the Snyder Trust by proxy. All of the officers, directors, stockholders and trustees holding stock in the Easton Publishing Company, except the Easton National Bank, Catharine McGrath and John H. McGrath, Jr., trustees, are affirmatively shown by the record to be native-born citizens of the United States. The Easton National Bank is a national bank organized under an Act of Congress. Neither of the McGraths is an officer or director of the applicant and their stockholding is substantially less than twenty percent of the total outstanding stock.

1322 18. *J. L. Stackhouse*, president, treasurer and a director of the Easton Publishing Company, as well as its general manager, has been associated with the company for 33 years. He has been active in the civic, business and religious life of the Easton community for many years. Mr. Stackhouse does not expect it will be necessary for him to devote a great deal of time to the operation of the proposed station but he can devote several hours a day to it if need be, and would call a meeting of the board of directors at any time the occasion should require a quick decision on any matter. While his experience lies largely in the newspaper field, as an officer and general manager of the publishing company he has gained some radio experience in the general supervision of the construction and operation of the company's FM radio station.

19. *Adele S. Fretz*, vice-president, secretary, and a director of the company, was born in Easton and lived there until 1930 when she married and moved to Bethlehem where she now resides. She was active in civic work in Easton prior to the time she moved to Bethlehem. She has been identified with the Easton Publishing Company as an officer and director since the death of her father, H. J. Steele, in 1933, but does not participate in the actual day-to-day operation of its activities. Mrs. Fretz is co-trustee with the Easton National Bank, under a trust created by the will of her father which owns slightly more than 49% of the

stock of the Easton Publishing Company as a part of the residuary estate. She votes the stock held by the trust and has a life interest in the trust income. Upon the death of Mrs. Fretz the principal of the residuary estate is to be distributed as follows: one fourth to the issue of Adele S. Fretz then living and, if there be no such issue,[14] then to the Easton Children's Home, one-fourth to St. John's Lutheran Church of Easton, one-fourth to Lafayette College, and one-fourth to the Easton Hospital; except for two minor bequests in the event the trust estate should dispose of all the stock of the Easton Publishing Company, in which event 50 shares, or the value thereof, shall be given to Mr. Stackhouse and 50 shares, or the value thereof, to the Estate of John H. McGrath, deceased.

20. *Anna M. Snyder*, a vice-president and director of the applicant corporation, is a lifelong resident of the Easton community. Her business interests include, in addition to those in the Easton Publishing Company, farming and ownership of an ice company. Mrs. Snyder has been actively identified with the over-all management of the company and its affairs since the death of her husband, Chester Snyder, during the latter part of 1946. Chester Snyder, at the time of his death, owned 3,732 shares, or 46.6% of the stock of the Easton Publishing Company. His estate was divided, one-third to his widow, Anna M. Snyder; one-third to his son, Daniel W. Snyder; and one-third to his widow, Anna M. Snyder, and son Daniel W. Snyder; as trustees, with the income therefrom to be paid to another son, Edward C. Snyder. The stock which is held in trust is to be distributed upon the death of Edward C. Snyder in specified bequests to certain named charitable institutions of Easton and the balance to Mrs. Snyder and her son, Daniel W. Snyder, or their heirs. Mrs. Snyder votes the stock held in the trust. She does not expect to participate in the actual day-to-day operation of the proposed station.

[14] Mrs. Fretz has adopted children but no living issue.

1323 21. *Daniel W. Snyder* is president of the Missouri Power and Light Company and lives in Jefferson City, Missouri. He does not participate in the applicant's business activities with respect to either the newspaper or radio interests, but is available on a consulting basis; his advice being sought particularly in financial and labor matters. This is done through correspondence and by telephone and occasional attendance at meetings. He did not testify in this proceeding, but his mother testified that he is a native-born citizen of the United States.

22. *Catharine McGrath* and *John H. McGrath, Jr.*, as trustees under the will of John H. McGrath, deceased, hold 184 shares of the Easton Publishing Company stock. Mr. McGrath, Sr. was managing editor of the Easton Express from 1917 until shortly before his death in 1944. The income from such trust is payable to Mary S. McGrath, widow of the testator, during her lifetime and upon her death the corpus of the trust estate is to be divided equally between the trustees or their issue. Mary S. McGrath is now living. Catharine McGrath is the society editor of the Easton Daily Express. Neither of these trustees testified in either hearing in this proceeding and it does not appear that either will participate in the management or operation of the proposed station.

23. The Easton applicant proposes to use the building and grounds of its FM station for the operation of the applied-for standard broadcast station, as well as for the television station for which the applicant has received a construction permit. The building, which cost some $135,000 and has 1600 square feet of floor space, has good physical facilities, including three studios. The estimated cost of additional construction necessary for accommodation of the proposed standard broadcast station is $12,000, and the increased cost due to the operation of the proposed standard broadcast station is estimated at approximately $1,000 per month. Four additional employees will be added to the

present staff of the FM station; the staff for the combined radio operations thereby totaling 18 persons.

24. *Nelson S. Rounsley*, who has been employed by the applicant for more than sixteen years, is the general manager of FM Station WEEX and is expected to serve as manager of the proposed combined operation. His only radio experience is that obtained in connection with FM Station WEEX which went on the air in 1948. He served as national advertising manager of the Easton Daily Express for about twelve years and before that held executive positions on newspapers in Lancaster, Altoona and Harrisburg, Pennsylvania. He became identified with the FM station during the course of its construction, and has since served as its general manager, devoting his entire time to the radio activities. He is a member of various local civic, religious, and fraternal organizations.

25. The Easton Publishing Company publishes a daily newspaper, known as the Easton Daily Express, which has a present circulation of approximately 44,400 in the Easton area. Its circulation in Allentown and Bethlehem is less than 25. The Express has been the only daily paper published in Easton since 1943 when a competitor ceased
1324 daily publication. The evidence of record indicates this resulted from a shortage of newsprint and manpower and labor problems. In general, the newspaper has been conducted as a separate operation from the operation of the FM station and the two have competed on a day-to-day basis for advertising revenue. The same policy will be followed in the operation of the proposed standard broadcast station. There will be no joint rates nor any effort to sell advertising in the two media at the same time. There will be a separate sales force for the radio operations and, generally, separate staffs, except for those engaged in the collection of news. The news collected by the staff of the Easton Express would be available to the proposed radio operation, as would news obtained from a private

teletype network, maintained in conjunction with the Allentown Call-Chronicle, with news-gathering offices located in Stroudsburg and Bethlehem, as well as in Easton and Allentown. The radio staff also includes two news reporters. The accounting for the radio activities of the Easton Publishing Company is now, and will continue to be handled by the accounting department of the newspaper and the billing for the radio operations is done by the billing department of the newspaper.

26. The Easton Express did not publish the program logs of Station WEST until 1948, although the station has been in operation since 1936. Previous to 1948, program logs of some New York stations were published by the Express using ready made mats purchased from the Herald Tribune Company of New York City. The newspaper began publishing the program logs of Station WEST about the time its own FM station (WEEX) went on the air, since to do so was felt to be the only fair thing to do as long as the newspaper was carrying the program logs of its own station. The stated policy of the Express has been to mention the call letters of Station WEST whenever such seemed pertinent to the news item which was carried. Asked to produce clippings from the paper showing mention of Station WEST, some eight clippings were produced. These clippings were obtained by a random search of the files of the newspaper, it having no separate file on articles in which the call letters of WEST appear. Station WEST has been identified on the church page of the Express every Saturday in connection with radio talks by local ministers. The call letters of WEST have not been mentioned by the paper in connection with some charity campaigns in which the station participated, employees of the stations have not been identified as such in some instances when their name has appeared in the Express, and a newspaper in a neighboring city printed an editorial commenting adversely on certain newsgathering practices of the Easton Express.

27. On direct examination, the president of the Easton Publishing Company testified that the Allentown and Bethlehem daily papers circulated in the Easton area as well as daily papers from Newark, New Jersey; Plainfield, New Jersey; Bangor, Pennsylvania; Philadelphia, Pennsylvania; and New York City. On cross examination, he testified he did not have figures on the circulation in Easton of the above-mentioned dailies, except for the Bethlehem Globe-Times which had a circulation of 59 in Easton, the Allentown Morning Call with a circulation of 453 in Easton, and the Allentown Evening Chronicle with a circulation of only 1 in Easton. The witness also testified, during direct examination, that several weekly papers circulated in the Easton area. When asked, on cross-examination,
1325 whether he had testified that the weeklies had any circulation in Easton, the witness stated that he did not intend to convey the impression that the weekly newspapers had any circulation in Easton; only that they circulated in the Easton area. The witness, after answering several questions relating to circulation in Easton of various of the aforementioned daily newspapers, answered in the negative a question as to whether he had any circulation figures on the weekly newspapers. Then, in reply to a suggestion that such papers were small in circulation, he testified as to their approximate total circulation.

Allentown Broadcasting Corporation

28. The Allentown Broadcasting Corporation is a Pennsylvania corporation formed in 1945 for the express purpose of operating a broadcasting station and engaging in other related activities. The corporation has no radio interests other than those involved in the instant application. The articles of incorporation, as amended, provide for authorized capital stock of $56,250 divided into 750 shares of common stock of no par value. 718 of these shares were issued and outstanding at the time of the 1951 further

hearing. As of December 31, 1950, the corporation had total assets of $85,999.96, consisting of $7257.48 in cash, $11,405.71 in accounts receivable, fixed assets amounting to $57,608.99; and other assets amounting to $9,727.78.[15] Liabilities, as of the same date, consisted of current liabilities totalling $13,788.46, loans payable to stockholders in the sum of $26,600, and mortgages payable in the amount of $14,000.

29. Station WHOL operated at a loss from the time it started operation in September 1948 to the close of that year in the amount of $15,223.64. During 1949, the station lost $22,012.86 and there was an operating loss of $5,921.94 for the first six months of 1950. Since then, the station has returned an operating profit, which amounted to $8,496.94 for the last six months of 1950, and was expected to approximate $15,000 for 1951. In addition to its earning and present assets, at the time the record was closed, the Allentown Broadcasting Corporation had $9,000 available under an agreement with four of its stockholders, Messrs. Diehm, Chisnell and Whitney, and Mrs. Deisroth. Under this agreement, dated December 21, 1949, the four stockholders agreed to lend the corporation $25,000, of which $16,000 had already been advanced at the time the record was closed. Also, under an agreement dated March 1, 1951, the same parties agreed to provide $15,000 in additional working capital if needed, contingent upon a grant of the instant application. The four stockholders are financially qualified to meet their commitments under these agreements. The interest on the stockholders' notes has been allowed to accrue, and the lending stockholders will not demand payment of either principal or the delinquent interest until the corporation is in adequate financial condition to make the payments without impairment to the operation of the station.

[15] Of this sum $9,136.16 represents organizational expenses.

1326 30. As of February 20, 1951, the officers, directors and stockholders of the Allentown Broadcasting Corporation were:

Name and Residence	*Position*	*Stock Shares*	*Stock Percentage*
Henry K. Bauman Allentown, Pa.	President and Director	23	3.20
Victor C. Diehm Hazleton, Pa.	Vice President and Director	84	11.70
Charles G. Helwig Allentown, Pa.	Sec'y.-Treasurer and Director	40	5.57
Edmund H. Scholl Allentown, Pa.	Director	40	5.57
Lewis Windmuller[16] Washington, D. C.	Director	201	27.99
Lynne C. Smeby Washington, D. C.	.....	13	1.81
John G. Willenbecher Macungie, Pa.	.....	20	2.79
David K. Gernerd Allentown, Pa.	.....	13	1.81
Carl H. Butman[17] Washington, D. C.	.....	20	2.79
Margaret Gernerd St. Mary[18] Arlington, Va.	.....	12	1.67
Hilda M. Deisroth Hazleton, Pa.	.....	84	11.70
E. H. Witney Hazleton, Pa.	.....	84	11.70
George M. Chisnell Hazleton, Pa.	.....	84	11.70
	Total	718	100

[16] Owned jointly with Cora G. Windmuller, his wife.

[17] Owned jointly with Marguerita M. Butman, his wife.

[18] Sister of David K. Gernerd and cousin of Charles G. Helwig.

1327 31. The Commission found the Allentown Broadcasting Corporation, and its officers, directors, and stockholders, to be qualified to become a licensee as of the time of the 1946 hearings, and the appellate court affirmed that finding. Considerable changes in stock ownership have occurred since that time, including the acquisition of 336

shares (46.8% of the total outstanding) by the "Hazleton group", Messrs. Diehm, Witney, and Chisnell and Mrs. Deisroth. The Hazelton group, who own Station WAZL in Hazleton, Pennsylvania, also have entered into an executory agreement, dated December 21, 1949, whereby they will purchase 114 additional shares (82 on a pro rata basis from the other stockholders and 32 shares of unissued stock), subject to the consent of the Commission, thereby increasing to 60 per cent their holdings of the corporation's stock. The citizenship and other qualifications of the members of the Hazleton group was established at the 1951 hearings. The owners of some 44% of the applicant's stock, including the President and two directors of the corporation, did not testify at the 1951 hearings. However, their qualifications were established during the 1946 hearings, and nothing to the contrary has since been placed in the record.

32. *Henry K. Bauman* has been postmaster of Allentown since December 1, 1945 and does not expect to participate in the day-to-day operation of the station. He is a native of Montgomery County, Pennsylvania and has resided in Allentown for more than 40 years. Mr. Bauman is a vice-president and director of a local real estate and title guaranty company and also director of a memorial cemetery association. He has served in various local civic capacities since 1927.

33. *Victor C. Diehm* has resided in Hazleton, Pennsylvania (about 50 miles northwest of Allentown) since 1932 where he is the general manager of Stations WAZL and WAZL-FM and also a 25% owner of the licensee of those stations.[19] As a boy he lived in the Pennsylvania Dutch country and often visited relatives in Allentown. Mr. Diehm

[19] The licenses of Stations WAZL and WAZL-FM have been assigned to a corporation with the former partners owning the same interest in the corporation. This licensee is also an applicant for a television station at Hazleton. Station WAZL does not serve any portion of the proposed service area of Station WHOL.

started his radio career with Station WCAO in Baltimore where he conducted a dance orchestra, from 1926 to 1928, and gained experience in the sales branch of the radio industry. In the latter part of 1928, he moved to Reading, Pennsylvania, and later to Allentown where he continued in the sales side of radio with stations located in those cities. He then became sales manager of Station WRAW at Reading and remained in that capacity until 1931 when he became sales manager for Station WILM, Wilmington, Delaware; and, in addition, gave sales assistance to Station WDEL, Wilmington. After several months in Wilmington he became sales manager of Station WGAL, Lancaster, Pennsylvania and later, vice-president in charge of sales at Station WORK, York Pennsylvania. In December of 1932 he was transferred to Hazleton as vice-president and station manager of WAZL, which was then preparing to go on the air. Other radio experience of Mr. Diehm includes aid in organizing a station in Meadville, Pennsylvania; working for some time at Station WEST, Easton Pennsylvania; assistance to Station WHOL in the sales branch since he became one of its stockholders in
1328 the latter part of 1949; and serving as an advisor to the licensee of Station WLTR, Bloomsburg, Pennsylvania. He is very active in the civic activities of Hazleton and the State of Pennsylvania, and also in the activities of the broadcast industry. Mr. Diehm first acquired an interest in Station WHOL about December 1949 and was immediately elected vice-president and director. He goes to Allentown about once a week at which time he and the other officers of the Allentown station meet and discuss the problems and affairs of the station among themselves and with Mr. Chambers, the station manager. It is Mr. Diehm's intention to continue the same practice with respect to the time and energy devoted to the Allentown station in the future. Mr. Diehm has a net worth of approximately $85,000 and has liquid assets available to meet the total of his obligation to the Allentown applicant under the agreements discussed elsewhere in this decision.

34. *Charles G. Helwig*, a native-born resident of Allentown, is an attorney actively engaged in the practice of law in that city. Mr. Helwig is local counsel for the Allentown applicant and, as such, handled the incorporation of the applicant and the changes which have occurred in the corporate structure. He is also secretary-treasurer and director of the corporation. Since the station commenced operation he has been called upon almost continuously to furnish assistance and counsel to it. He intends to continue in as active a capacity in the future so long as the proposed operation of the station requires his services.

35. *Hilda M. Deisroth* also owns a 25% interest in the licensee of Stations WAZL and WAZL-FM in Hazleton, Pennsylvania. She conducts a speech class for the announcers of these stations each week, with emphasis on diction and word pronunication. She does not expect to move to Allentown or to participate actively in the day-to-day operation of Station WHOL. Mrs. Deisroth is active in the civic affairs of Hazleton. Apart from her interests in Stations WAZL and WAZL-FM and in the Allentown applicant, she has no radio interests. Mrs. Deisroth has a net worth of approximately $150,000, independent of the assets of her husband, from which to meet her financial commitments to the Allentown station.

36. *E. H. Witney* is a coal mine owner and operator and also owns a construction company engaged in highway, bridge and other kinds of construction work. In addition to his mining and construction interests, he has a minority interest in a farm equipment company and a fuel company, and is half owner of an organization dealing in mine stripping equipment. All of these businesses are operated in or from Hazleton. His only radio interests consist of those in the licensee of Stations WAZL and WAZL-FM in Hazleton and in the Allentown applicant. He is and has been active in Hazleton civic affairs participating in various civic drives and activities of the community. He does not

expect to participate in the day-to-day operation of Station WHOL and has no present plans to move to Allentown. He has a net worth of approximately $1,800,000, from which to meet his financial commitments to the Allentown station.

1329 37. *George M. Chisnell* owns 40% of a company engaged in mining anthracite coal; has 75% interests in a company conducting open strip mining of anthracite coal; and is the sole stockholder of the Chisnell Auto Electric Service, dealing in specialized automotive equipment such as speedometers, carburetors, etc. He also owns a general merchandise store. All of these businesses are located in the Hazleton area. His only radio interests are those in the licensee of Stations WAZL and WAZL-FM in Hazleton and in the Allentown applicant. Mr. Chisnell is active in the civic life of Hazleton. He does not expect to move to Allentown or to participate in the day-to-day operation of Station WHOL. Mr. Chisnell has a net worth in excess of $400,000 from which to meet his financial commitments to the Allentown applicant.

38. *Edmund H. Scholl* is a lifelong resident of Allentown and the sole owner of a wholesale mercantile business. Mr. Scholl has been active in Allentown civic affairs and has served as president of the Lehigh County Agricultural Society, better known as the Allentown Fair, for more than 20 years. Mr. Scholl is not expected to participate in the day-to-day operation of the station but will attend board meetings and advise the board with respect to agricultural programs in particular.

39. *Lewis Windmuller* is a resident of Washington, D. C. where he has resided for some 20 years. Between September 1945 and the 1946 hearing he devoted his time to the organization of the applicant corporation and the preparation of the application for Stations WHOL. Cora G. Windmuller, his wife, is a school teacher in Washington, D. C. At the time of the original hearing the Windmullers proposed to move to Allentown and Mr. Windmuller proposed

to act as general manager of the station, devoting his full time to direct supervision of the day-to-day operations. Mr. Windmuller did manage the station during its construction and early operation but does not now devote any time to the day-to-day operation of the station, although he has remained as a member of the board of directors and attended the annual meeting of the stockholders early in 1951 and a directors' meeting immediately following.

40. *David K. Gernerd* and *Margaret Gernerd St. Mary* are brother and sister. Mr. Gernerd, a lifelong resident of Allentown, is now a vice-president in charge of a wholesale tobacco and confectionery distributor company for Allentown. He has not taken any active part in the operation of Station WHOL and does not intend to do so in the future. He has no radio interests other than his interest in the Allentown Broadcasting Corporation. Mrs. Margaret Gernerd St. Mary resides in Arlington, Virginia and no showing is made in this record that she has participated in any way in the operation of the station or expects to do so in the future.

41. *Carl H. Butman and Marguerita Butman* reside in Washington, D. C. Mr. Butman is engaged in the radio consulting business. They do not expect to move to Allentown and neither of them will participate in the day-to-day operation of the station. *Lynne C. Smeby* is a consulting engineer who lives and practices in Washington, D. C. Mr. Smeby has been chief engineer for various radio stations.

He does not propose to participate in the day-to-day
1330 operation of the station, but will advise on engineering matters. *John G. Willenbecher* is a public accountant in Allentown. He acquired his stock subsequent to the 1946 hearing. Mr. Willenbecher suffered a severe heart attack sometime prior to the 1951 hearing and did not testify. It is not expected that he will participate actively in the operation of the station.

42. Two small studios are now employed by the Allentown applicant in the operation of Station WHOL and no additional construction will be required if the application is granted. A third studio is contemplated when financial conditions are such that further construction would be financially proper. The applicant has 13 full-time employees and a part-time bookkeeper engaged in the operation of Station WHOL. *James F. Chambers*, the manager, has charge of all station activities under the supervision and direction of the board of directors. He devotes his entire time to the station operation and personally oversees the sales and engineering departments and directs all programming and, in addition, announces several special programs. His radio experience includes one year with the Japanese network of the Armed Forces Radio Service and little more than a year with Station WLBR, Lebanon, Pennsylvania, in addition to his experience with Station WHOL. Mr. Chambers has been with Station WHOL since it first went on the air, serving first as staff announcer, then chief announcer, program director, acting station manager and station manager.

Engineering Considerations

43. The two applicants request authority to establish new standard broadcast stations to operate on 1230 kc, with 250 watts power, unlimited time, in Easton and Allentown, Pennsylvania respectively. The simlutaneous operation of the proposed stations would result in mutually destructive interference. Neither station would deliver a signal of 2 mv/m intensity to the other city.

THE EASTON PROPOSAL

44. The testimony of the consulting engineer for the Easton applicant on the equipment proposed to be installed is somewhat conflicting. For example, on direct examination he testified that there will be no change in any of the

original equipment specified, but when he was later asked by Commission counsel whether there was any change in the equipment originally proposed to be used at the Easton station he replied "only insofar as newer types of equipment have superseded the types stipulated within the original application, which might be true with respect to the transmitter proposed, or with respect to the monitors proposed"; and when he was asked on cross examination by counsel for Allentown if he could state definitely whether or not the transmitter specified in the application will be installed by the applicant, his reply then was: "No, I can merely state that whatever is installed will be in accord with FCC requirements and Standards, and an approved model of transmitter." He made the same response to similar questions with respect to the modulation monitor and frequency monitor specified in the application. The

1331 evidence indicates that, while the transmitter proposed to be installed will be of an approved type, it may be of a newer type than that described in the application. The same is true with respect to the frequency and modulation monitors. The installation of the station will be under the supervision of the consulting engineer retained by the Easton applicant and will be in conformity with the Standards of Good Engineering Practice. The Easton Publishing Company proposed to utilize its present FM transmitter building for its proposed AM transmitter and to use the tower now supporting its FM antenna. The proposed antenna has an over-all height of 150 feet above ground and a ground system consisting of 90 radials, each 200 feet long, evenly spaced about the base. The site is near the northerly limits of Easton more accurately described by the geographic coordinates N 40° 42′ 25″, W 75° 13′ 7″. The proposed antenna system meets the minimum requirements of the Standards of Good Engineering Practice.

45. A complete coverage survey was made, utilizing a low-powered transmitter, at the antenna site of the pro-

posed Eastern station. The test transmitter operated on 1040 kc with a power of approximately 80 watts and used a vertical antenna, having an over-all height of 150 feet including the FM antenna of Station WEEX, with a rather sketchy ground system. Based upon an effective field of 85 mv/m and the soil conductivities established by the above-mentioned measurements, the areas and populations [20] within the pertinent contours of the proposed station are as follows:

Contour (mv/m)	Area (sq. mi.)	Population
500	0.08	11
250	0.29	406
25	14.55	41,227
18.1 (night limitation)	23.00	57,057
5	116.20	85,202
2	304.00	144,568
0.5 (normally protected daytime)	943.00	214,979
0.5 (interference-free daytime)	900.40	212,479

46. Operation of the proposed Easton station would cause objectionable co-channel interference to Station WCDL, Carbondale, with its normally protected contour during the daytime. The pertinent contours of Station WCDL in the direction of Easton are based on an effective field of 92 mv/m and conductivity for 16 miles as de-
1332 rived from measurements made on Stations WCDL in that direction, combined with conductivity values shown on FCC map using equivalent distance method for remainder of distance. This interference would fall within a small crescent-shaped area within the 0.5 mv/m contour of Station WCDL in the direction of Easton, embracing an area of 12 square miles in which it is estimated that 383 persons reside constituting approximately 2.13% of the total area and 0.51% of the total population within such contour. The deepest point of penetration is to the 0.57 mv/m contour of Station WCDL and falls in an area lo-

[20] All population figures in engineering computations, unless otherwise noted, are based upon the U.S. 1940 Census; and the population of all cities and towns of 2,500 or more lying between the 2 mv/m and the 0.5 mv/m contours have been excluded.

cated approximately 10 miles from Carbondale. Other primary services available to the area of interference to Station WCDL include three stations serving 100% of the area, one station serving 95% of the area, one station serving 80% of the area and one station serving 45% thereof.

47. Conversely, the proposed Easton station would receive interference during the daytime from Station WCDL over a small crescent-shaped area within its proposed 0.5 mv/m contour in the direction of Carbondale. This interference area includes an area of 31.5 square miles in which there is a population of 1,547 persons. The interference extends to the 0.64 mv/m contour of the proposed Easton station and the deepest point of penetration is approximately 15 miles from Easton. The area and population within the normally protected daytime (0.5 mv/m) contour of the proposed Easton station which would not gain service due to interference from Station WCDL presently receive primary service from several stations. The proposed Easton station would also receive slight interference during the daytime within its 0.5 mv/m contour from Station WFAS, White Plains, New York, over an area of 10.1 square miles wherein 953 persons reside. This area of interference to the Easton proposal presently also receives primary service from several stations. The combined interference of WCDL and WFAS affects some 1.2% of the population within the daytime normally protected contour of the proposed Easton station, and the interference caused by each such station affects considerably less than one per cent of such population.

48. The proposed Easton station would place a signal of 25 mv/m or more over all of the business and industrial districts of Easton, both day and night, except remote and isolated business and industrial districts in the southern part of the city. The proposed station would place a signal of 5 mv/m or better over all of the city of Easton, and the entire city would be within the 18.1 mv/m nighttime inter-

ference free contour. The proposed station would render primary service to 6.7% of the area and 17.55% of the population within the metropolitan area at night and 83.5% of the area and 47.7% of the population during the daytime (0.5 mv/m). The population residing in the 250 mv/m contour (406 persons) represents less than 1% of the population within the metropolitan area which would be served by the proposed Easton station both day and night, on the bases of both the 1940 and the 1950 Censuses.

49. The proposed Easton operation would be in conformity with the terms and provisions of the proposed North American Regional Broadcasting Agreement, and would provide the city of Nazareth, Pennsylvania, having a population of slightly over 5500, with its second daytime primary service.

1333 THE ALLENTOWN PROPOSAL

50. Station WHOL is installed and now in operation,[21] and it is proposed to continue the operation of such installation. The antenna system consists of a series-fed vertical tower, 200 feet in height above 5-foot insulators, and over-all height above mean sea level of 545 feet. The ground system consists of 120 equally spaced radials around the base of the tower, each 200 feet long, except to the east where they intersect the property line, in which direction the minimum radial length is approximately 160 feet. The site is near the geographical center of Allentown and is more accurately described by the geographical coordinates N 40° 35′ 32″, W 75° 28′ 42″. The antenna system meets the minimum requirements of the Standards of Good Engineering Practice. The transmitter, frequency monitor, and modulation monitor are approved types.

51. Computations based on a complete field strength survey of Station WHOL made in accordance with the Stand-

[21] See paragraph 6, *supra*.

ards of Good Engineering Practice show the following areas and populations within the pertinent contours of the Allentown station:

Contour (mv/m)	Area (sq. mi.)	Population (1940)
500	0.09	256
250	0.34	944
25	21.20	85,044
18.2 (night limit)	28.60	91,690
5	133.00	161,177
2	310.00	242,276
0.5 (normally daytime protected)	976.00	316,389
0.5 (interference-free daytime)	939.00	314,461

52. Using the conductivity values set forth in the Standards of Good Engineering Practice in all instances, except with respect to the contours of Stations WHOL and WHUM where measurement data was available, and antenna radiations shown in the Commission's files, the proposed operation of WHOL would cause slight objectionable interference to Stations WCAU, Philadelphia, WCDL, Carbondale, WKBO, Harrisburg, and WHUM, Reading; all in Pennsylvania.

53. Station WHOL will cause adjacent channel interference daytime to Station WHUM, operating on 1240 kc, 250 watts, unlimited time, over a small, irregularly shaped area at the outer limits of the 0.5 mv/m contour of Station WHUM in the direction of Allentown. This area is 27 square miles in extent and has a population of 1,636 persons. The 0.5 mv/m contour of Station WHUM covers an area of 963 square miles and a total population of
1334 256, 544 persons. However, Station WKOK, operating at Sunbury, Pennsylvania on 1240 kc, already causes interference within the 0.5 mv/m contour of Station WHUM over an area of 37 square miles having a total population of 2,173 persons, leaving a present interference-free area of 926 square miles, with a population of 254,371. The interference caused by Station WHOL thus affects only 3% of the area and 0.6% of the population residing

within the present interference-free contour of Station WHUM. Nine other stations presently serve this entire interference area, a tenth station serves a substantial portion of the area, and another serves a small portion thereof. The area would also receive primary service from Station WHOL.

54. Station WCAU, operating on the frequency of 1210 kc, 50 kw power, unlimited time would receive adjacent channel interference from the proposed Allentown operation in small areas immedately contiguous to the city of Allentown. These areas total 1.68 square miles and contain a total population of 625 persons. The total interference-free service area of Station WCAU encompasses 12,579.32 square miles in which resides a total population of 4,104,755. The interference caused to Station WCAU by Station WHOL represents approximately 0.0013% of the WCAU interference-free area and 0.015% of the population residing within the interference-free area of Station WCAU. All of these small interference areas receive service from at least 9 other stations daytime and 7 other stations at night; several others serve parts thereof.

55. Station WCDL operating on 1230 kc, 250 watts power, unlimited time, receives co-channel interference, daytime, from Station WHOL over an area of 19.4 square miles wherein a total population of 412 persons reside. The interference area is crescent-shaped and lies at the extreme southern end of the 0.5 mv/m contour of Station WCDL. The deepest point of interference is to the 0.59 mv/m contour of Station WCDL and lies approximately 11 miles from Carbondale. The 0.6 mv/m contour of Station WCDL encompasses 563 square miles wherein a total population of 76,758 resides. Thus, the interference caused by Station WHOL results in the loss of Station WCDL service by 3.6% of the area and 0.54% of the population within the normally protected daytime contour of Station WCDL. Five other stations serve this entire interference area and one additional station serves 50% thereof.

56. Station WKBO operating on 1230 kc, 250 watts, unlimited time, also receives slight co-channel interference, daytime, from Station WHOL, in a crescent-shaped sector lying at the extreme eastern edge of the 0.5 mv/m contour of the Harrisburg station. This interference area totals 2.6 square miles and has a population of 124 persons. The 0.5 mv/m contour of Station WKBO encompasses 367 square miles with a total population of 167,546 persons. Thus, the interference caused to it by Station WHOL affects only 0.7% of the area and 0.07% of the population within the normally protected daytime contour. Four other stations serve this interference area in its entirety.

57. The proposed Allentown station would render a signal of 25 mv/m, or better, over the business and industrial areas of Allentown. The population within the 250 mv/m contour equals substantially less than 1% of that portion
1335 of the 1940 Metropolitan District population which would receive primary service during the daytime from the proposed operation and approximately 1.03% of such metropolitan population served at night. Assuming the same percentage of the metropolitan population is served, the population within the 250 mv/m contour is approximately 0.36% of the 1950 Standard Metropolitan Area population served during the daytime and 0.76% at night. On the basis of 1940 census figures, Station WHOL renders primary service daytime to 98.4% of the area and 78.5% of the population within the metropolitan area, and primary service at night to 28.2% of the population within the metropolitan area. The entire city of Allentown receives a 5 mv/m or better signal from WHOL, and approximately 89% of the population and area of the city are within the 18.2 mv/m nighttime interference free contour.

58. The operation proposed in the application of Allentown Broadcasting Corporation is in conformity with the terms and provisions of the proposed North American Regional Broadcasting Agreement.

Existing Service in the Communities

EASTON

59. Station WEST, the only standard broadcast station now located in Easton, provides a 2 mv/m or better signal [22] to all of the city of Easton daytime, to approximately 70% of the city at night, and to about 40% of the urban areas [23] proposed to be furnished a 2 mv/m signal by the Easton applicant, daytime. Under the Commission's Standards of Good Engineering Practice, a 2 mv/m signal is sufficient to provide primary service to all except the business and factory areas of cities over 10,000 population. WEST also renders a primary service daytime to about 45% of the rural areas proposed to be served by the Easton applicant, and to a substantial portion of such areas at night. Two FM stations are also located in Easton. Station WEST-FM is operated by the licensee of Station WEST and the programs carried by the two stations are substantially the same. Station WEEX-FM is licensed to the Easton Publishing Company, which also has a construction permit for a television station on the only channel allocated to Easton. There is no probative evidence in the record as to the number of FM or television receiving sets in Easton, or as to the coverage of the FM stations.

1336 60. Station WEST operates on 1400 kc, with 250 watts power, unlimited time, and is on the air approximately 128 hours a week. The station is affiliated

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22 The estimates of existing service made herein are based on evidence as to the signal strengths provided to the areas in question by the stations involved, utilizing the conductivity values listed in the Standards of Good Engineering Practice and the effective radiation for the respective stations, as shown by the Commission's files, to determine such signal strengths. The pertinent contours of the two proposals are based upon measurements which show a higher conductivity for the areas than that given in the Commission's Ground Conductivity Map. Thus, the estimates of existing service are probably the minimum services available to the communities.

23 Cities of over 2500 population within the daytime 2 mv/m contour of the proposed Easton station include, in addition to Easton, all of Phillipsburg, Wilson Borough, and Nazareth and a portion of Bethlehem.

with the NBC [24] and MBS [25] networks. According to an analysis of WEST's program logs for the week beginning January 14, 1951, network programs constituted about 44.4% of the total broadcast time, recorded programs 33.6%, wire programs 11%, and live programs 11%. During the same week, the broadcast time by program types was divided as follows: 70.39% entertainment, 4.76% religious, 2.31% agricultural, 2.18% educational, 11.57% news, 1.12% discussions, and 7.67% talks. Of the total broadcast time, 70.3% was devoted to commercial programs and 29.7% was devoted to sustaining programs. The station also broadcast 500 commercial and 100 noncommercial spot announcements during the week.

61. Station WEST is owned by Colonel James Hill Steinman and Mr. J. F. Steinman, both of Lancaster, Pennsylvania, who also own several other radio and television stations. During the year 1950, the station carried 2,777 locally originated programs in the interests of various local civic, religious, educational, philantrophic, fraternal, and governmental organizations, and also broadcast some 4,088 announcements for such organizations. The station has conducted intensive drives for such organizations as the March of Dimes and the American Cancer Society and to raise funds for the local hospital and community baseball team. Religious programs include a 15 minute daily devotional period, Monday through Friday, a one minute prayer delivered at noon, Monday through Saturday, Sunday morning church services from the various local churches on a monthly rotation basis, a weekly Sunday program by a colored minister, and a series of programs sponsored by the Catholic Church, as well as the network religious programs. Local high school and college sporting events are frequently broadcast, often on a "re-cap" basis.

[24] Used here and hereafter in this opinion to refer to the National Broadcasting Company radio network.

[25] Used here and hereafter in this opinion to refer to the Mutual Broadcasting System radio network.

All news programs are wire, although some local news gathered by a reporter employed by the station is often included. A wide variety of network programs, as well as many other locally originated programs including local athletic events, are broadcast by WEST. The station has been unsuccessful in obtaining programs devoted to the development of local talent.

62. No standard broadcast station located outside of Easton regularly broadcasts programs designed especially for the benefit of the Easton community, or regularly originates programs therefrom. According to the probative evidence in the record, Station WOR, a New York City station connected with the MBS network, is the only outside station providing a 2 mv/m signal to the entire city of Easton, and does so both day and night. At least nine stations (including WOR and WEST) furnish a 2 mv/m signal daytime to varying portions (up to 40%) of the area within the 2 mv/m contour of the proposed Easton station. The entire rural area proposed to be served daytime by the Easton applicant receives primary service from Stations WNBC (NBC network), WJZ (ABC[26] network), and WOR, all located in New York City; WCAU
1337 (CBS[27] network), Philadelphia, and WARM (ABC), Scranton. Stations WIP (MBS) and WFIL (ABC), Philadelphia, serve more than 90% of such rural area; KYW (NBC), Philadelphia, and WSAN (NBC), Allentown, serve in excess of 70% thereof; WAEB (ABC) and WKAP (unaffiliated), Allentown, and WGPA (unaffiliated), Bethlehem, and WCBS (CBS), New York City, serve 50% or more thereof; WPEN (unaffiliated), Philadelphia, serves more than 40% thereof; and some nine other stations serve under 40% of such rural area daytime. At night, Stations WOR, WNBC, WJZ, WCAU, and KYW

[26] Used here and hereafter in this opinion to refer to the American Broadcasting Company radio network.

[27] Used here and hereafter in this opinion to refer to the Columbia Broadcasting System radio network.

provide primary service to all the rural area proposed to be served by the Easton applicant.

Allentown

63. Four local standard broadcast stations serve the Allentown-Bethlehem area, of which three (WAEB, WKAP, and WSAN) are located in Allentown and one (WGPA) is located in Bethlehem. All four provide a 2 mv/m or better signal to the city of Allentown during the daytime. WKAP and WSAN provide such a signal to the entire city at night and WAEB to about 75% of the city. WSAN provides primary service to the entire rural area to be served by the proposed Allentown station during the daytime, WGPA and WKAP serve over 90% of such rural area, and WAEB more than 40% of such area. At night, WSAN and WKAP provide primary service to rural areas proposed to be served by the applicant and WAEB serves a substantial part of such area. Two FM stations are located in Allentown [28] and one FM station in Bethlehem. According to Commission records, no applications for television station construction permits for the two channels allocated to Allentown have been granted at this time. The channel allocated to Bethlehem has been granted to Station WLEV-TV. There is no probative evidence in the record as to the number of FM or television receiving sets in Allentown, or as to the coverage of the FM stations.

64. Station WSAN, which operates on 1470 kc, with 5 kw power, unlimited time, broadcasts approximately 124 hours a week and is affiliated with the NBC network. During the week of January 14, 1951, which is typical of the program service of the station, 55.08% of broadcast time was devoted to network programs, 19.07% to recorded programs, 2.15% to wire programs and 23.70% to locally originated live programs. During the same week, 58.70% of

[28] One of these stations WFMX, had an outstanding construction permit at the time the record in this proceeding was closed. Commission records reveal that the station has since been granted a license.

the broadcast time was devoted to commercial programs and the remaining 41.30% was sustaining. 409 commercial spot announcements and 73 non-commercial sport announcements and 73 non-commercial spot announcements were broadcast. The station devoted 67.17% of the broadcast time during the week to entertainment programs 5.64% to religious programs, 6.05% to agricultural programs, 1.41% to educational programs, 11.49% to news broadcasts, 3.63% to discussions, and 4.61% to talks. Station WSAN 1338 broadcasts numerous announcements for local civic, educational, and other such organizations, and has broadcast programs and conducted drives for such causes as the March of Dimes. A 30 minute Pennsylvania Dutch dialect program is broadcast every Sunday, and a regular series of programs under the auspices of the local public schools have been broadcast. WSAN is the only station in Allentown that regularly broadcasts Allentown High School basketball and football games, pursuant to an arrangement with the high school, and other sports programs are regularly broadcast. The station supports a local little symphony orchestra, and broadcasts concerts by it periodically. Religious broadcasts by local churches are on a commercial basis. Sustaining religious programs are produced or directed by B. Bryan Musselman, an owner of the station, and two half hour Sunday afternoon programs designed for Catholics, one of which is locally produced, are sustaining. Many other network and local programs are also carried.

65. Station WAEB operates on 790 kc, with 500 watts power daytime, 1 kw power at night. It is on the air approximately 121 hours weekly and is affiliated with the ABC network. The station also broadcasts programs of the Atlantic Baseball network and MBS purchases time from the station for certain of that network's programs. An analysis of the programs presented by WAEB for the week beginning January 14, 1951, which is representative of the program service rendered by the station, reveals that the

station devoted 61.53% of its total broadcast time to network programs, 32.57% to recorded and transcribed programs, 3.18% to wire programs, and 2.72% to locally originated live programs. During the same week, 39.76% of the broadcast time was devoted to commercial programs, and 179 commercial spot announcements and 220 non-commercial spot announcements were broadcast. An analysis of the broadcast time as to types of programs shows that 71.12% were of an entertainment nature, 5.37% were classified as educational,[29] 4.88% were religious, 0.75% were agricultural, 1.47% were sports, 13.35% were news, and 3.06% were so-called public service programs. Station WAEB broadcasts sustaining programs regularly or on a series basis for several local and national civic, governmental, and other non-profit organizations, as well as numerous intermittent programs and spot announcements for such organizations. The station carries broadcasts of professional baseball and football games and other sporting events, and features polka music. Religious broadcasts are accepted on both a commercial and sustaining basis, some eight such programs being broadcast on Sundays as well as two Saturday religious programs. A variety of other network and local programs are also broadcast by the station.

66. Station WKAP at the time of the hearing was operating daytime only on 1580 kc with 1 kw power, but had a construction permit to change to 1320 kc, with 1 kw power, unlimited time.[30] The station was on the air a total
1539 of 66½ hours weekly at the time the record was closed, and had no network affiliation. During the week of January 14, 1951, which is not typical because of time devoted to a March of Dimes drive to the exclusion of

[29] None of the programs so classified were prepared by or on behalf of an educational organization as is required by the definition of an education program given by the Commission.

[30] According to Commission records, Station WKAP started program tests June 14, 1951 under the new authorization and a license to cover the construction permit for the new facilities was issued on August 17, 1951.

certain publicity usually provided to other local, non-commercial groups, entertainment programs were broadcast 84.33% of the total time on the air, religious programs 2.25%, agricultural programs 0.37%, news programs 6.26%, and 0.78% of such time was devoted to discussions and 6.01% to talks. During the same week, the station devoted 1.5% of its broadcast time to network programs, 81.9% to recorded programs, 5.2% to wire programs, and 11.4% to locally originated live programs. Commercial programs accounted for 58.5% of the week's broadcast time, and approximately 639 commercial and 52 non-commercial spot announcements were made. Station WKAP broadcast only two religious programs during the week of January 14, 1951, both of which were commercial. The station has offered to carry a program by the local Jewish rabbi, but no definite response had been received at the time the testimony was taken. A program entitled "Club Time" is scheduled and may be used by non-profit organizations to publicize their activities. A daily women's program is broadcast and a daily sports program. A Junior Chamber of Commerce Forum, which was organized by the station's general manager, is broadcast live every Sunday afternoon, and a program designed for small children is broadcast on Saturdays. A station commentator editorializes on controversial local issues, and the station endeavors to present opposing views. The station has a large library of music records and developed the first polka music program in the area. News programs are wire, but also include local news gathered by station employees. A variety of other programs are also broadcast.

67. Station WGPA operates daytime only on 1100kc, with 250 watts power. The station, which has not network affiliation, is located in Bethlehem and concent[illegible]s on that city. However, the station carries some ad[illegible]sing on behalf of Allentown organizations, although [illegible]oes not send a salesman there on a regular basis, or[illegible]nates some pro-

grams from Allentown, and provides a daytime primary service to that city. Analysis of the station logs of Station WGPA for the week of January 14, 1951, show that 78.3% of the total broadcast time was devoted to recorded programs, 4% to wire programs, and 17.7% to local live programs. By program types, 77.23% of broadcast time was classified as entertainment, 4.17% as religious, 0.76% as agricultural, 2.79% as educational, 4.32% news, 1.26% discussion, and 9.47% talks. During the same week, 36.1% of the total broadcast time was devoted to commercial programs, and 286 commercial spot announcements and 35 non-commercial spot announcements were broadcast. The station offers sustaining time to all denominations for religious programs and caries a considerable amount of such religious programming, as well as non-denominational programs. The station has participated in a number of local civic drives, broadcasts many sports events, and broadcast a series of concerts by the Allentown Municipal Opera Company, as well as a variety of other programs.

68. Other than the Bethlehem station, no standard broadcast station located outside of Allentown regularly broadcasts programs designed especially for the benefit of the Allentown community, or regularly originates programs therefrom. Two Philadelphia stations, WFIL (ABC network) and KYW (NBC network) provide a 2 mv/m or better signal to the entire city of Allentown during the daytime and KYW does so at night. Stations WFIL and KYW together with Stations WIP (MBS network), Philadelphia, WCAU (CBS network), Philadelphia, WNBC (NBC), New York City, and WOR (MBS), New York City, furnish primary service to all the rural area proposed to be served by the Allentown applicant during the daytime. Four other outside stations serve more than 40% of such rural area and 11 additional stations serve smaller portions thereof. Stations WNBC, WOR, WCAU, KYW, and Station WJZ (ABC), New York City,

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serve all the rural area proposed to be served nighttime by the applicant. Nine stations including the Allentown and Bethlehem stations) deliver a 2 mv/m contour of the proposed Allentown station, ranging from 96.4% to 1% of the total area.

Proposed Program Service of the Easton Applicant

69. The application filed by the Easton Publishing Company in 1946 has not been amended insofar as it relates to such matters as equipment and program service. The Allentown applicant objected, during the 1951 hearings, to the introduction of evidence on these matters by the Easton Company insofar as such evidence varied from the proposals in Easton's application and the testimony introduced thereon at the 1946 hearing. The Examiner over-ruled the objections and denied a subsequent motion to strike all such evidence. The Allentown applicant did not file a statement of exceptions with the Commission following the Initial Decision, and thus the objections must be deemed to be waived as is provided by Section 1.854 of the Commission's Rules. In any event, we believe that the Examiner properly over-ruled the objection to the evidence and the motion to strike. The evidence as to program proposals does not vary so substantially from the very general percentages listed in the application[31] as to operate to the prejudice of the Allentown applicant. Similarly, the evidence is that while the equipment may vary in type from the specified in the application, there will be no variance in performance or coverage.[32] It is not believed that such evidence materially varies from the application, or is prejudicial to the Allentown applicant. Also, it is clear that

[31] These were 50% entertainment, 5% educational, 3% religious, 7% agricultural, 15% news, 5% sports, 10% fraternal and miscellaneous public service, and 5% special feature. It was stated that the figures given were only approximations, and that no definite figures could be given at that time. The application also states that approximately 45% of program time would be devoted to recorded programs, and that commercial programs would probably not exceed 50% of total broadcast time.

[32] See also paragraph 44 of the Findings, *supra*.

the evidence presented at the 1951 hearing supersedes that presented at the 1946 hearing, to the extent that there is a conflict. The Commission recognized in the broad issues upon which the further hearing was designated that substantial changes in stockholders, officers, program, proposal, etc. might well have occurred since the 1946 hearing, necessitating the introduction of new evidence on such matters.

1341 70. If the application of the Easton Publishing Company is granted, the majority of the programs proposed will be duplicated over the Company's FM Station WEEX, for the hours that station is on the air. Station WEEX now broadcasts about 64 hours weekly. During the sample week of January 14, 1951, 79.26% of total broadcast time was devoted to entertainment programs, 2.22% to religious programs, 1.17% to educational programs, 12.79% to news programs, 1.17% to discussion programs, and 3.39% to talks. Of such time, 74.52% was devoted to recorded programs and 25.41% to local live programs; 3.87% to commercial and 96.13% to sustaining programs. Some 108 commercial spot announcements and 66 non-commercial spot announcements were broadcast. During a three year period between February 1948 and February 1951, Station WEEX broadcast some 172 programs featuring local talent, some 151 panel programs paticipated in by local civic leaders, numerous school activities, a series of music appreciation programs designed for grade school children, numerous sports programs and programs for local and national civic, governmental, etc. groups, as well as many other programs. The programming of the FM stations differs in several respects from the program proposals advanced by the licensee in applying for the FM license. Such program proposals were made on the basis of a combined FM-standard broadcast operation. Although unsuccessful in obtaining a standard broadcast license at the time, the Easton Company proceeded to construct the FM station, and has continued

to operate the station despite losses which amounted to approximately $55,000 in 1949 and $58,000 in 1950. The station does not operate in the morning, as was planned for the combined FM-standard broadcast operation, signing on the air at 3:00 p.m. The Commission renewed the license of Station WEEX on May 31, 1950.

71. The Easton applicant intends to broadcast some 119¾ hours weekly over its proposed standard broadcast station. It is proposed to devote 77.23% of the total broadcast time to entertainment programs, 3.97% to religious programs, 1.74% to agricultural programs, 1.46% to educational programs, 7.80% to news, 2.30% to discussions, and 5.50% to talks. Of the total broadcast time, 75.07% will be devoted to transcribed programs and 24.93% to live programs. Not more than 65% of the total broadcast time will be devoted to commercial programs, and commercial spot announcements will not exceed three in a 14½ minute period and probably will not total more than 250 to 300 weekly. The number of non-commercial spot announcements will depend upon the needs of the community. With minor exceptions, the proposed program schedule for the standard broadcast operations will duplicate the present programming of the FM station for the hours that such FM station is in operation. Such programs as the panel discussions, the music appreciation series, the dramatic plays put on by the Easton Playors Guild, religious broadcasts, and local newscasts will be continued and in some cases expanded. Some programs, such as sports and special events, are not listed in the program schedule because of their seasonal or irregular occurrence, but will be carried when appropriate. Centenary Junior College, Hackettstown, New Jersey, and Lafayette College have been offered the use of the facilities of the proposed station, and expect to utilize such facilities if they become available.

1342 72. Program policies adopted by the Easton applicant include promotion of local talent; full coopera-

tion with local educational institutions; availability of the facilities of the proposed station without charge to all civic organizations and, generally, to all federal, state and local government agencies; broadcasts of discussion of issues of general public interest with an effort to see that opposing views are presented; use of the station's facilities without charge by local religious organizations, on a rotating basis; the carrying of political broadcast, with an equal opportunity to purchase time afforded to all candidates; limitation of the length and number of commercial spot announcements; and limitation of commercial programs to approximately 65% of broadcast time with commercial commitments not permitted to interfere with the broadcasting of important local events. In addition to the news editor and news reporter employed by the radio station, the news gathering facilities of the Easton Express will be available to the proposed station, as will the Associated Press wire service news. No news commentaries will be broadcast. Many of the local programs proposed to be broadcast by the Easton applicant are similar in a general way to programs now broadcast by Station WEST. Such programs may vary considerably, however, not only as to the day and hour of presentation and the length and frequency of the broadcasts, but also as to the program structure—the type of music, religious programs, sports, etc. broadcast. Also, some local programs proposed by the Easton applicant have no local counterpart of any sort on Station WEST, including live local news programs and locally produced drama programs utilizing local talent.

73. The application of the Easton Publishing Company states that network affiliation is not contemplated, but that the applicant would consider carrying network programs if they should become available and if they were not already received in the Easton area and if they would not interfere with the applicant's plan to give a complete local service. During the 1946 hearing, the applicant's witness

testified as to a proposed affiliation with the MBS network and program proposals introduced in evidence were based on such an affiliation. The program schedule proposed at the 1951 hearing contains no network programs and no mention of the network affiliation question was made on direct examination. Under cross examination by counsel for Allentown, the general manager and program witness for the proposed Easton station first testified that the "present plan" is not to have a network affiliation.[33] Later on, during cross examination by counsel for the Commission, this same witness testified that network commercial religious programs might be accepted by the station in the event of a network affiliation; and then in reply
1343 to another question from counsel for Allentown said that he had not said, in answer to the earlier question (footnote 33) that affiliation with a network is not intended[34] and that, "if offered a desirable affiliation, we would certainly consider it." At the conclusion of cross examination, the witness was questioned by the Presiding Officer as to the plans of the Easton applicant with respect to network affiliation for the proposed station. This questioning[35] established that network affiliation is not now

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[33] When Mr. Rounsley was first asked concerning network plans, the following colloquy took place:

Cross-examination by Mr. Rollo:

"Q. I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network program on your proposed AM schedule.

"A. That is correct.

"Q. That is your present plan, is it?

"A. That is the present plan.

[34] The text of the question and answer follows:

(By Mr. Rollo):

"Q. Did not you answer a question of mine to the effect that you did not intend to affiliate with the network?

(By Mr. Rounsley):

"A. I did not say we did not intend to, I said we made no overtures at all. That is in the remote possibility that some time in the indefinite future we might affiliate."

[35] By the Presiding Officer:

"Q. Mr. Rounsley, I am a little confused about this network proposition. I wish you would tell me what your plans are with respect to network. Now let us not talk about the dim distant future, let us talk about something not quite so far away.

"A. If we have an AM facility we would probably explore the possibility

planned but that the possibility of a network affiliation would probably be explored and an affiliation ar-
1344 ranged if a desirable connection were available. The record does not show what network programs would be broadcast in case a network affiliation which it considers "desirable and available" should be found by the Easton applicant, or what programs now proposed would be scrapped to make way for network programs.

Proposed Program Service of Allentown Applicant

74. As hereinbefore discussed, the Allentown Broadcasting Corporation constructed Station WHOL in the face of the appeal of the grant by the Easton Publishing Company, and that station is now in operation. The Allentown Broadcast Corporation proposes to continue the same general type of program service it is now rendering to Allentown and community and its proposed program plans[36] are in most respects the actual programs now being broadcast over Station WHOL.

75. During the composite week of 1950 network programs were carried 52.76% of the time; recorded and transcribed programs, 35.63%; wire programs, 4.99%; and live locally originated programs, 5.62%.[37] An analysis of the programs of the composite week, on the basis of types, shows that 77.65% of the total broadcast time was devoted to entertainment programs, 1.48% to educational and cul-

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of a network affiliation. We would naturally have to see what was available, what the terms are, something we do not know now, but we would explore that possibility.

"Q. Am I to understand you would not wait for somebody to come to you?

"A. That is correct. In other words, we would have to have something to affiliate before we talk business.

"Q. It is still not clear in my mind. Do you plan to sit by and wait for somebody to approach you, or what would be your procedure?

"A. I think we would probably see what was available, and after we saw what was available, if there was a network that we thought was desirable and available, we would probably call them."

[36] The Allentown application was amended in 1950 to reflect its current programming plans.

[37] These percentages total 99% rather than 100%. This appears to be due to the fact that the percentages are carried out only to two decimal points.

tural programs, 3.59% to religious programs, 11.09% to news, 0.84% to agricultural programs, 2.60% to sports, and 2.75% to speeches and interviews. During the same composite week, 41.82% of the total broadcast time of the station was devoted to commercial programs; and 370 commercial spot announcements and 131 non-commercial spot announcements were broadcast. During the sample week of January 14, 1951, Station WHOL devoted 76.60% of the total broadcast time to entertainment programs, 3.72% to religious programs, 1.26% to educational programs, 12.92% to news, 1.05% to discussion, and 4.43% to talks. During the sample week, the station devoted 57.49% of its broadcast time to network programs, 34.65% to recorded and transcribed programs, 3.37% to wire programs, and 4.49% to locally originated live programs; and 50.95% of the broadcast time was devoted to commercial programs, and 405 commercial spot announcements and 134 non-commercial spot announcements were broadcast.

76. Station WHOL is affiliated with the CBS network and the applicant proposes to continue such affiliation. It is the only station affiliated with CBS that provides a 2 mv/m or better daytime signal to the cities of Allentown, Bethlehem, Catasaqua, Coplay, Emmaus, Fountain Hill, Hellertown, Northampton, and North Catasaqua, Pennsylvania. According to the 1940 census, each of these cities have a population of more than 2500, and the total population of all nine cities is more than 190,000. The continuing policy of Station WHOL is to provide time without charge to all local bona fide organizations of a civic, charitable, religious, or fraternal nature, taking the initiative, in many instances, in planning programs for such
1345 groups. During the period between September 1948 and December 1950, the station broadcast some 2480 programs and 7488 noncommercial spot announcements for various non-profit organizations (approximately 145 altogether) of a civic, religious, governmental, etc. nature.

Station WHOL encourages the development of local talent, particularly by means of furnishing time for the broadcast of programs. A number of programs have been originated from the local schools, and a weekly program in cooperation with the public schools is being broadcast. During the seasons of 1948, 1949, and 1950, the Cedar Crest College Choir was broadcast through WHOL over the CBS network and, on at least two occasions, by the Voice of America. Other Cedar Crest, Lehigh, Mulhenberg, and Moravian college programs are carried.

77. Station WHOL is very liberal in providing time for religious broadcasts, and carries a substantial number and variety of such broadcatss. All religious programs are on a sustaining basis. A daily morning devotional program rotates on a weekly basis among members of the Allentown Ministers League, and WHOL is the only station presently furnishing time to such Ministers League. At the time the record was closed, WHOL was the only station in Allentown which broadcast a locally originated program designed for members of the Jewish faith. Several other religious programs are also carried. The station does not employ a regular news reporter and all its news programs are classified as either network or wire. It subscribes to the United Press Wire news service, and uses that for a substantial portion of its local news coverage. The station carries a wide variety of network programs, and numerous local programs other than those mentioned, including some of a type not carried by other local stations. Many of the station's programs are of a type not being broadcast at the same time by any other local station.

1346 *Conclusions*

1. The Allentown Broadcasting Corporation and the Easton Publishing Company are applicants for standard broadcast stations to be operated upon the frequency 1230 kc in Allentown and Easton, Pennsylvania, respectively.

The two cities being only 14 miles apart, simultaneous operation of the proposed stations would result in mutually prohibitive interference. Thus, only one of the applications can be granted.

2. The qualifications of the officers, directors, and stockholders of the Allentown applicant who were stockholders at the time of the 1946 hearings were found to be satisfactory by the Commission at that time. Nothing to the contrary having been established in the record developed at the 1951 further hearing, and considering the stipulation entered into by the parties at the 1946 hearing,[1] it is concluded that these qualifications still exist. Newcomers to the corporation's roster of stockholders since 1946 include Hilda M. Deisroth, E. H. Witney, George M. Chisnell, and Victor C. Diehm, who hold an aggregate of 46.8% of the presently issued and outstanding stock. The evidence in this record shows that each of these persons possess the necessary qualifications to become a licensee of a radio station. Therefore, the legal, financial, and other qualifications of the officers, directors, and stockholders owning in excess of 95% of the outstanding stock has been established. The Allentown Broadcasting Corporation is financially qualified, its equipment and the installation thereof satisfies the Commission's standards, and an experienced full-time station manager will be employed. We, therefore, conclude that the applicant is legally, technically, financially and otherwise qualified to become the licensee of the radio broadcast station which it proposes.

3. A serious question as to the qualification of the Easton applicant to be a radio station licensee has been raised by the contentions of the Allentown applicant and the findings of the Hearing Examiner that the principal witnesses of the Easton applicant at the hearings in this proceeding were reluctant, evasive, and lacked candor in their testimony as to certain matters including the network affiliation

[1] See paragraph 15 of the Findings.

and programming plans of the proposed station, the competition afforded the applicant's newspaper by certain other newspapers and the circulation figures of certain newspapers, and as to the dividends paid by the Easton Publishing Company in 1950. These findings were based primarily on what was thought to be conflicts in the testimony of such witnesses, the eliciting by cross-examination of certain information which the Examiner considered should have been made clear during the witness' direct testimony, and a professed lack of knowledge of a matter which the Examiner considered the witness reasonably should have known. Because of the seriousness of the matter and the fact that the Examiner's findings were primarily based on her evaluation of testimony by one witness rather than on her judgment as to the creditability of different witnesses who make contradictory statements, we feel that we are obligated to independently evaluate the evidence in question, giving due weight to the opinion of the Examiner and the contentions of the parties.

1347 4. We are satisfied from our examination of the testimony in question, as well as from the record as a whole, that there is no persuasive indication of reluctance, evasiveness, or lack of candor on the part of the Easton witnesses, and that, to the contrary, the testimony of such witnesses properly viewed, gives an overall appearance of consistency, candor, and straightforwardness. Concerning the network affiliation and programming plans of the applicant, we think the testimony is nowhere inconsistent with the applicant's position that a network affiliation is not presently planned, but may occur if a desirable affiliation becomes available in the future.[2] The failure to testify as to network plans on direct examination does not appear to be significant in the absence of a present plan to affiliate and program proposals based on such a plan. As to the competition offered the Easton Express by other news-

[2] See paragraph 73 of the Findings.

papers,[3] the witness in answer to a question as to what other papers circulated *in the Easton area*, named the Allentown and Bethlehem dailies, and several other daily and weekly newspapers. We do not believe that this testimony, in context, can be construed as an attempt to create an impression that the Allentown and Bethlehem dailies offered substantial competition to the Express, or that the later testimony of the witness during cross-examination as to the exact and small circulation of the papers *in Easton* is contradictory or indicative of a lack of candor. Further, the testimony of the witness about the circulation of certain weekly papers is consistent and, in our opinion, candid.[4] It is clear from the context that his first statement professing ignorance of their circulation referred to circulation *in Easton* while his later testimony was to the *total* circulation of the papers. Finally, the inability of the President of the Easton Company to state the dividends paid by the company in 1950[5] is not incomprehensible in view of the apparent lack of any reason to be prepared to answer such a question, and cannot give rise to a finding of evasiveness in the absence of any showing that he actually knew the answer and was attempting to evade placing it in evidence.

5. The Allentown applicant further contends that since the Easton Publishing Company presently owns the only newspaper in Easton, as well as an FM station, and has a construction permit for the only television station, the grant of the company's application in question here would strengthen the company's virtual monopoly over the sources of news in the community. The Allentown applicant therefore contends that the grant of the application of the Easton Publishing Company would not be in the public interest and should be denied, regardless of the comparative needs of the communities, especially in view of what the Allentown applicant regards as practices indicative of the use

[3] See paragraph 27 of the Findings.
[4] See paragraph 27 of the Findings.
[5] See paragraph 16 of the Findings.

by the publishing company of its newspaper monopoly in a manner detrimental to Station WEST, the only existing standard broadcast station in Easton. Newspaper control, however, does not automatically disqualify an applicant, although diversification of the sources of news may be an element in determining the public interest in the
1348 grant of an application. The operation of the Easton Company's newspaper and radio interests is and will be substantially separate, and sales of advertising space or time in the newspaper and over the air will be entirely separate with no combined rates.[6] We do not believe that there is evidence in the record to justify a finding that the Easton Publishing Company has used its newspaper to attempt to obtain a monopoly over news sources in the community, or otherwise in a manner not in the public interest.[7] The evidence indicates that the last competing daily newspaper in Easton ceased publication because of newsprint and manpower shortages. While the Commission does not approve of the Express' failure to carry the program logs of Station WEST for some time, such logs have been carried since the commencement of the operation of the Easton Company's FM station which is some indication of the lack of an intention to freeze out WEST. Evidence as to the policy of the Express concerning printing of news about WEST in its columns is at best inconclusive. Hence, we are convinced that the Easton Publishing Company is not disqualified to be a station licensee solely because of its newspaper ownership and activities.

6. The Allentown applicant also questions the reliability of the Easton applicant in view of the failure of the latter to fulfill the program proposals relative to the operation of Station WEEX made by the Easton applicant in applying for a license for the FM station. We do not believe, however, that the Easton applicant should be censured for this failure considering that the program proposals were

[6] See paragraph 25 of the Findings.
[7] See paragraph 26 of the Findings.

based on a projected combined FM-standard broadcast operation which would have operated longer hours daily than has proved possible to operate the FM station alone. Our satisfaction that the operation of the FM station has been in the public interest and as closely in accord with the original program proposals, under the circumstances, as could reasonably be expected is indicated by our renewal of the license of such station.[8]

7. Approximately 65% of the stock of the Easton Publishing Company is held by three trusts, which stock may be disposed of by the trustees at any time. The Allentown applicant contends that the concentration of control of the Easton company in the hands of trustees casts doubt upon the qualification of the Easton applicant to be a broadcast station licensee, under the policy laid down in *Doughty & Welch Electric Co.*, 10 F.C.C. 398 (1944). In that case, the Commission indicated its doubts about the advisability of granting a broadcast station license to an applicant the management of which would be in the hands of trustees without beneficial interests in the trust properties and whose primary interests are in rendering general trust services as trustees. However compelling the policy expressed by the *Doughty & Welch* case may be under the proper circumstances, it clearly is not applicable here. The trustees of the trusts involved, except for the Easton National Bank, are persons whose families have long been connected with the Easton Publishing Companies and there is nothing to indicate that their primary interests are in rendering general trust services. All the trustees, except the bank, either receive income from the
1349 trust, have a remainder interest in the trust estate, or have close relatives who are beneficiaries of the trust. The bank does not vote the stock of which it is co-trustee. Moreover, the general manager of the Company is a regular stockholder and not a trustee.

[8] See paragraph 70 of the Findings.

8. The citizenship and other statutory qualifications of the officers, directors, and stockholders owning in excess of 97% of the stock of the Easton Publishing Company was established by the evidence presented at the 1951 hearings. The Easton Publishing Company does not represent and is not organized under the laws of any foreign government, is financially qualified to be the licensee of the proposed station, and is not otherwise subject to any statutory disqualification. The equipment proposed to be used and the installation thereof will satisfy the requirements of the Commission's Standards of Good Engineering Practice,[9] and an experienced station manager will operate the proposed station. We, therefore, conclude that the Easton Publishing Company is legally, technically, and otherwise qualified to be the licensee of the proposed standard broadcast station.

9. The principal issue in this proceeding is which of the two communities involved has the greater need for an additional standard broadcast service. This issue arises under Section 307(b) of the Communications Act, which requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same."

10. At the present time, the city of Allentown receives primary service[10] daytime from six standard broadcast

[9] The Examiner stated it could not be ascertained from the record whether the equipment would conform to the specifications of the application. The record is clear, however, that the equipment to be installed will accord with the Standards of Good Engineering Practice, and that such equipment will depart from the specifications in the application only insofar as newer types of equipment have superseded the types specified in the application. Such variations may reasonably be expected considering that the application was filed in 1946, and are not so substantial as to prejudice the other applicant in any way. See also paragraph 69 of the Findings.

[10] Although for purposes of the conclusions, it is assumed that the entire cities of Allentown and Easton received primary service from the stations enumerated as providing such service, it is possible that the business and industrial areas do not receive a signal sufficiently strong to constitute primary service under the Commission's Standards of Good Engineering Practice. See paragraph 59 of the Findings.

stations, of which three are located in Allentown, one in Bethlehem, and the other two outside the Allentown-Bethlehem area. At night, three standard broadcast stations, including two located in Allentown, provide primary service to the city of Allentown, and a third Allentown station provides primary service to a substantial portion of such city. Numerous stations, including the Allentown and Bethlehem stations, provide primary service to the rural areas proposed to be served by the Allentown applicant. The stations located in Allentown provide balanced program services affording residents of the community with a
1350 choice of both network and locally originated programs. The Bethlehem station also originates some programs from Allentown, although concentrating primarily on the city of Bethlehem.

11. Two standard broadcast stations, one located in Easton and one located in New York City, provide primary service to the city of Easton during the daytime. The New York station also serves the city at night and the Easton station the greater part of the city. Numerous stations, including the one located in Easton, provide primary service to all or part of the rural area proposed to be served by the Easton applicant, both day and night. The Easton station, WEST, provides a balanced program service, including both network and locally originated programs.

12. Both applicants propose a well-balanced program service designed to meet the needs of their respective communities. Both applicants propose to broadcast programs designed for or originated from educational institutions located in or near their respective communities, to provide time to local civic, religious, governmental, and other such groups and organizations, and to provide programs oriented towards the interests of other important elements in the communities—such as women and agricultural groups—as well as broadcasting numerous programs directed to listeners in general. Each applicant proposes to

present some local programs not now available from existing stations in the communities. Thus, for example, the Allentown applicant proposes to broadcast a locally originated program for the members of the Jewish faith, a type of program available only over Station WHOL at the time the record was closed, and would provide the only outlet for CBS network programs to a large number of persons in the area. Similarly, the Easton applicant proposes live broadcasts of local news and locally produced dramatic programs utilizing local talent, neither type of program being available from the standard broadcast station now located in Easton at the time the record was closed. The Easton applicant has a greater degree of local ownership and better facilities, while the integration of ownership and operation is slightly greater in the case of the proposed Allentown station. However, both proposed stations are to be operated primarily by a full time manager and the Allentown facilities are adequate. The manager of the proposed Allentown station is more experienced than the manager of the proposed Easton station, but both are qualified for their positions.

13. Considered separately, each community might well be found to have a need sufficient to justify an additional service of the type proposed by the applicants, and on the basis of most of the above factors and other considerations advanced by the applicants, there is little room for choice between the two communities. There is one decisive factor, however, which requires a conclusion that the Easton community has a greater need for the standard broadcast service proposed by the Easton applicant than the need of the Allentown community for the standard broadcast service proposed by the Allentown applicant. Allentown is presently served by three standard broadcast stations located in and broadcasting local programs for that city, as well as receiving daytime service from the station located in adjoining Bethlehem, while only one standard broadcast

station is located in and broadcast local programs for the Easton community. Thus, the residents of the Allentown community presently are afforded a choice between
1351 local standard broadcast programs and stations, a choice which can only be made available to the residents of the Easton community by means of an additional standard broadcast service.

14. The importance of a choice of locally originated programs as an element establishing a greater need in a Section 307(b) case has been previously recognized by the Commission and the courts. In *Northwestern Ohio Broadcasting Corp.*, 3 Pike & Fischer Radio Regulation 1945 (1948), there were mutually exclusive applications for grant of construction permits to establish stations on the same standard broadcast frequency in Lima and Columbus, Ohio. At that time, Columbus had a population of some 305,000 with four local standard broadcast stations operating daytime and three at night while Lima had a population of some 45,000 with one local standard broadcast service. Both cities received primary service from outside stations. Despite the facts that Columbus was approximately seven times as large as Lima and that the proposed Columbus station would provide service to a substantially greater number of persons that the proposed Lima station, the latter city was determined to have the greater need because of the advantage of providing both communities with a choice between locally originated programs. This decision was affirmed by the Court of Appeals for the District of Columbia, per curiam, subsequent to the remand of the proceeding here under consideration.[11]

15. As the *Northwestern Ohio* case makes clear, the facts that the Allentown area has a population approximately three times as large as the Easton area and that the pro-

[11] *Sky Way Broadcasting Corp.* v. *Federal Communications Commission*, 176 F. 2d. 951 (1949). See also *Lake Huron Broadcasting Corp.*, 6 Pike & Fischer Radio Regulation 1185, 1211 (1951).

posed Allentown station will serve a considerably greater number of people than will the proposed Easton station, does not weaken our conclusion that Easton has the greater need, nor does the availability to Easton of service from outside stations. Section 307(b) does not require the allocation of radio frequencies on a strict mathematical basis[12] and the Commission may consider the availability of local transmitting services as well as the availability of broadcast services to each. Our conclusion that Easton has the greater need also is not affected, under the circumstances of the case, by the fact that two FM stations are located in that community and a construction permit has been granted for a television station to be located there.[13] While such factors may have considerable weight where the need of the communities are involved for an additional standard broadcast service is closely balanced, the need of the people in the Easton community who have only standard broadcast receivers for a second standard broadcast service clearly is the dominating factor here.[14] Moreover, there is no clear evidence in the record as to the number of FM receivers in the communities involved on which to base a conclusion on the ability of the FM stations to serve the needs of the communities,

and the television station has not commenced op-
1352 erations. The fact that the proposed Easton station would interfere with reception of Station WCDL, Carbondale, Pennsylvania, by some 383 persons, is also insignificant under the circumstances. The proposed Allentown station would interfere with reception of WCDL by a slightly larger number of persons, all persons receiving interference are served by numerous other stations, and the need of Easton for an additional local standard broadcast

[12] Cf. *Easton Publishing Company* v. *Federal Communications Commission*, 175 F. 2d 344, 348 (1949).

[13] *Easton Publishing Company* v. *Federal Communications Commission*, 175 F. 2d 344, 349 (1949).

[14] See *Kokomo Pioneer Broadcasters*, 6 Pike & Fischer Radio Regulations 285, 306 (1950).

service clearly overbalances any need which may exist for the WCDL service which will be lost as a result of the proposed operation.

16. Since only the Easton Publishing Company proposes to originate programs in and for the Easton community and to provide a primary service to that community, we think it obvious that the proposal of the Easton Publishing Company will more adequately meet the needs of the Easton community than will the proposal of the Allentown Broadcasting Company. The Easton applicant proposes to devote approximately 25% of its total broadcast time to live programs of local origin and, as previously noted, will provide a well-rounded program service including religious, agricultural, educational, news, discussion, and talk programs. We believe that these proposals for varied types of programs with a substantial amount of programming to be of local origin will, if carried into effect, result in a program service designed to meet the local needs and interests of the Easton community, and especially the need for a choice between locally originated programs. We are convinced, therefore, that a grant of the Easton application will be in the public interest.

17. In reaching the above conclusion, we have rejected the conclusion of the Hearing Examiner that the record does not disclose with the "required certainty" the program service which would be rendered by the Easton applicant in the event its application were granted. The Examiner's conclusion was based primarily on her finding that the Easton applicant had been evasive and uncandid about whether or not a network affiliation is planned. For the reasons given in paragraph 4 of these Conclusions, we do not agree that the applicant has been evasive or uncandid about its network affiliation plans. The program proposals of the applicant do not reflect a network affiliation since such is not now contemplated.

The fact than an affiliation may be entered into in the future if a desirable arrangement becomes available does not render these proposals so uncertain as to preclude any findings or conclusions based thereon. Program proposals are not a rigid straightjacket beyond which future operation of the station must never vary. A certain flexibility with the passage of time is not only permissible but also desirable if the licensee is to be free to carry out his responsibility to program in the public interest. Of course, program proposals are not something to be forgotten once a grant is obtained, and must not be used in such a way as to mislead the Commission as to the intentions of the applicant. There is no evidence that such is the case here. The applicant has frankly stated that a network affiliation is not now planned but may be entered into in the future if a desirable affiliation becomes available. And, it is also stated in the application that should such an affiliation occur, the applicant's plans for a complete local program service would not be disrupted.

1353 18. The proposal of the Easton Publishing Company does not conflict with the proposed North American Regional Broadcasting Agreement. The proposal will, however, depart from the Commission's Standards of Good Engineering Practice in that primary service will not be rendered to at least 90% of the metropolitan area population, but to only some 47.7% of the metropolitan area population by day and 17.55% of such population at night. Coverage of the city of Easton would, however, be complete. In view of this fact together with the need of Easton for an additional standard broadcast service, and the ability of the applicant to meet that need, the failure of the Easton proposal to promise adequate coverage to the metropolitan area is not fatal and is hereby waived. For the same reasons, the failure of the proposed operation to provide a 25 mv/m signal to certain outlying business and industrial areas in Easton may be condoned.

ORDER

Accordingly, it is hereby ardered, this 26th day of June, 1953, that the application of the Allentown Broadcasting Corporation is DENIED, and that the application of the Easton Publishing Company is GRANTED.

FEDERAL COMMUNICATIONS COMMISSIONS
T. J. SLOWIE
Secretary

(SEAL.)

Released: July 2, 1953

Signed by above; mailed by July 2, 1953.—*Mail & Files*

APPENDIX

Rulings of the Commission on the Exceptions to the Initial Decision

Exceptions of the Easton Publishing Company

Exception No.	*Ruling*
1, 3, 9, 11, 18, 81, 104(1)	Denied, for the reasons given in the opinion.
2, 8, 13, 14, 15, 16, 17, 19, 20, 24, 29, 32, 39(b), 44(a), 48(a), 49, 53, 54(a) and (b), 60, 65, 66, 75, 82, 86, 87, 91, 92, 93, 96, 97, 101, 103, 105, 108	Granted to the extent that the opinion has been revised.
4, 5, 7, 12, 22, 25, 26, 27, 28, 51, 52, 63, 89, 95(2), 98, 99, 102, 109	Granted and the opinion has been modified accordingly.
6, 55, 56(a) and (b), 68	The statements to which objection is made have been deleted from the opinion.
21	Denied. The findings sufficiently set forth the circumstances of the agreement with the Hazleton group, for purposes of the decision.
23, 67	Denied. The requested findings are made elsewhere in the opinion.
30, 31, 33, 34, 35, 37, 39(a), 40, 41, 42, 46, 48(b) and (c), 54(c) and (d), 56(c), 58, 59, 61, 62, 64, 71, 73, 76, 78	Denied. The detailed exposition of the evidence requested is unnecessary to the decision reached herein.
36, 43, 44(b), 57, 70, 72, 74, 77, 79, 83, 95(1), 104(2)	Denied as unnecessary in view of the revision of the opinion.
38, 45, 47, 50	Denied for the reason that the term "public service programs" has no established meaning and does not indicate the type of programs for which additional time is available.
69	Denied for the reason that the findings made adequately reflect the evidence of record.
1355 80, 107	Denied. The evidence does not give rise to any substantial doubt that the Allentown applicant has carried out its original program proposals to a reasonable extent.
94	Denied. No question has been raised by the parties as to a failure to meet many of the specific statutory qualifications, and it is therefore not necessary to discuss each such qualification separately in the conclusions.
106	The requested conclusion is denied, for the most part, since the conclusions in the opinion as revised are adequate for purposes of the decision.

1356 *Exceptions of the Chief, Broadcast Bureau of the Federal Communications Commission*

1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 17, 18, 19, 21, 22, 25, 26, 28, 31, 38, 39, 40, 42, 43, 44, 47, 48, 49, 50, 51, 54, 56, 57, 59, 60, 61, 62, 66, 72, 73, 76, 78, 79, 81, 83, 85, 88, 89, 90, 95, 97, 98, 102, 103, 109, 111, 118, 119, 121, 122, 124, 125, 126, 127, 129, 130, 131, 133, 135, 136, 137, 140, 143, 144, 145, 146, 148, 149, 150, 151, 152, 154, 155, 156, 157, 158, 160	Granted and the opinion has been modified accordingly.
3, 14, 16, 33, 52, 106, 123, 141	Denied as immaterial, irrelevant, or unnecessary to the decision.
5, 13, 15, 20, 23, 24, 29, 37, 41, 45, 46, 53, 55, 63, 64, 65, 68, 69, 70, 71, 74, 75, 77, 80, 82, 84, 87, 93, 94, 99, 101, 112, 116, 117, 132, 134, 138, 139, 142, 147, 153, 159	Granted to the extent that the opinion has been revised.
27, 105.	Denied, for the reasons given in the opinion.
30, 36.	Denied, for the reason that the record as a whole does not give rise to any substantial question concerning a transfer of control of the Allentown applicant and additional finding on the matter would unduly lengthen the opinion, especially in view of the decision reached.
32.	Denied, for the reason that the finding made adequately reflects the evidence of record.
34, 35.	Denied. The record as a whole does not give rise to any substantial question concerning the reliability and other qualifications of the stockholder and the requested finding would unduly lengthen the opinion, especially in view of the decision reached.
58, 67, 86, 96, 100	Denied. The detailed exposition of the evidence requested is unnecessary to the decision reached herein.
1357 91.	Denied, for the reason that the finding as revised is material to the Commission's evaluation of the testimony in question.
92.	Denied, for the reason that the finding is supported by evidence and is material to the Commission's consideration of the applicant's program proposals.

104.	Denied. The general exception to all conclusions and the general request that all conclusions proposed by the party be adopted does not comply with Section 1.854 of the Rules.
107, 108.	Denied. The conclusions as revised are material to the determination of the qualifications of the applicant.
110, 114.	Denied in part. The conclusions objected to have been revised. However, the program services proposed by the applicants and the relative abilities of the applicants to serve the needs of their respective communities are factors which may be taken into consideration in determining which community has the greatest need for the radio service proposed by the applicant.
113, 128.	The conclusions sought to be modified have been deleted from the opinion.
120.	Denied for the reason that the conclusion as revised is material to determination of the qualifications of the applicant.

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1919 **Letter to Easton Publishing Co. from FCC, July 9, 1953**

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

July 9, 1953

Easton Publishing Company
30 North Fourth Street
Easton, Pennsylvania

Gentlemen:

On June 26, 1953 the Commission granted your application (File Number B2-P-4212) authorizing construction of a new standard broadcast station at Easton, Pennsylvania.

Attached hereto is a copy of Section 1.342 of the Commission's Rules and Regulations requiring the filing of contracts and other instruments. Sections 1.343 and 1.344 of

the Commission's Rules and Regulations require the filing of information as to ownership and control of said station. Attached also are two copies of FCC Form 323 referred to in said rules.

Since said rules cover permittees as well as licensees it is requested that you report *fully* all the information covered by the rules using the attached report FCC Form 323. The complete report and the necessary contracts and other instruments should be filed with the Commission (in single copy) within 30 days of the date of the grant of your construction permit. If already a licensee of a broadcast station, only such information need be reported as is not already on file with the Commission.

If for any reason there is delay in the filing of the report of submission of contracts and other instruments, it will be necessary for you to submit also an adequate explanation as to the reasons therefor.

Very truly yours,

T. J. SLOWIE,
T. J. Slowie,
Secretary.

cc: M. Roberts

84357—5-53

1917 File No. BP-4212
Call Letters WEEX

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

Standard Broadcast Station Construction Permit

Subject to the provisions of the Communications Act of 1934, subsequent Acts, and Treaties, and Commission Rules made thereunder, and further subject to conditions set forth in this permit,[1] authority is hereby granted to

[1] This construction permit consists of this page and page 2.

EASTON PUBLISHING COMPANY to construct a standard broadcast station located and described as follows:

1. Station location: State Pennsylvania City Easton

2. Transmitter location: State Pennsylvania County Northampton
City or Town North city limit of Easton
Street and number Pennsylvania State Highway 115-90
North Latitude: Degrees 40 Minutes 42 Seconds 25
West Longitude: Degrees 75 Minutes 15 Seconds 7

3. Main studio location: State Pennsylvania County Northhampton
City or Town North city limit of Easton
Street and number Pennsylvania State Highway 115-90

4. Description of transmitter:
RCA MFG. CO., Type BTA-250-L, Broadcasting Transmitter.
Last radio stage; two 125-watt vacuum tubes for high level modulation.

5. Description of antenna system:
Antenna: 147′ (150′ overall height) uniform cross-section, guyed, series-excited, vertical steel radiator.

6. Description of ground system:
Ground system consists of 90 buried copper radials 200′ in length.

7. Operating assignment:
(a) Frequency 1230 kilocycles.
(b) Power:
Night 250 watts—non-directional antenna
Day 250 watts—non-directional antenna
(c) Hours of operation Unlimited time.

8. Date of required commencement of construction by August 26, 1953

9. Date of required completion of construction February 26, 1954

10. Equipment and program tests shall be conducted *only pursuant* to Sections 3.167 and 3.168 of the Commission Rules.

11. This permit shall be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow unless completion of the station is prevented by causes not under the control of the permittee. See Section 1.314 of the Commission Rules.

Dated this 26th day of June, 1953

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
T. J. Slowie, *Secretary.*

(SEAL) July 17, 1953 af

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1926 **Letter from Donald C. Beelar to FCC, July 24, 1953**

The Honorable Rosel H. Hyde, Chairman
Federal Communications Commission
Washington 25, D. C.

Re: Docket Nos. 7179 and 7180

My dear Chairman Hyde:

As counsel for Allentown Broadcasting Corporation (Station WHOL), of Allentown, Pennsylvania, we feel obliged, in the course of preparing a petition for rehearing of the Commission's decision of July 2, 1953, in this matter, to make inquiry as follows:

(a) Were there any papers submitted in this case by the Commission's "review staff", Office of Opinions and Re-

view, or Office of the General Counsel, for consideration by the Commission prior to oral argument (or at the Commission's meeting next following oral argument at which the case was considered), in the form of summary of evidence, compilation of facts, or memoranda on the case, other than papers made available to the parties?

(b) If the answer to the question is in the affirmative, may we, as a party in this case, be furnished a copy of any such paper(s) or be accorded an opportunity to examine the contents thereof?

If any such paper exists, we feel that a very substantial question is presented in this case unless we are allowed to be apprised of its contents.

Respectfully submitted,

DONALD C. BEELAR
Donald C. Beelar

DCB/dgm
cc: Richard Solomon, Esq.; Eliot C. Lovett, Esq.

1809 **Letter to Donald C. Beelar from FCC, July 29, 1953**

July 29, 1953

Mr. Donald C. Beelar
Kirkland, Fleming, Green, Martin & Ellis
World Center Building
16th and K Streets, N. W.
Washington 6, D. C.

Dear Mr. Beelar:

The Commission has received your letter of July 24, 1953 in which you, as counsel for the Allentown Broadcasting Corporation, request that you be furnished with a copy of any papers which may have been submitted to the Commission by its staff in connection with its consideration of the proceedings in Docket Nos. 7179 and 7180.

Your letter gives no indication as to why you believe that you would be entitled to examine any such confidential inter-office memoranda which might have been prepared for the Commission during the course of those proceedings and the Commission is aware of no such reason. We are, therefore, constrained to deny the requests contained in your letter.

By Direction of the Commission
ROSEL H. HYDE
Rosel H. Hyde
Chairman

Approved Commission meeting July 29, 1953, General Agenda.

Signed by above: mailed by July 30, 1953.—*Mail & Files*

1846 BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

FCC 53-984—93118

In re Applications of

EASTON PUBLISHING COMPANY
Easton, Pennsylvania
Docket No. 7179

ALLENTOWN BROADCASTING CORPORATION
Allentown, Pennsylvania
Docket No. 7180

For Construction Permits.

Memorandum Opinion and Order

By the Commission: Commissioner Bartley not participating.

The Commission has before it a pleading designated "Application for Modification of Order, for Stay, or for Other Interim Relief" filed by the Allentown Broadcast-

ing Corporation (hereinafter referred to as "Allentown") on July 13, 1953. This pleading relates to the decision of the Commission released July 2, 1953 which granted the application of Easton Publishing Company (hereafter referred to as "Easton") for a construction permit to build a standard broadcast station in Easton, Pennsylvania and simultaneously denied the mutually exclusive application of the petitioner for a construction permit for a standard broadcast station in Allentown, Pennsylvania. In the pleading here under consideration, Allentown requested the Commission to enter an order postponing the effective date of the decision "as applied to the continued operation of radio station WHOL under its outstanding license authorization, pending final decision in this proceeding, including judicial review or opportunity within the statutory period for judicial review", or to enter an order staying the effectiveness of the Commission's decision pending an opportunity for filing a petition for rehearing (including a period of not less than 30 days following notice of the Commission's action upon any such petition for rehearing) or to grant such other relief as might appear warranted. On July 14, 1953, an opposition to this request for interim relief was filed by Easton. This opposition, however, stated that it would not object were the Commission, in its discretion, to continue to allow the Allentown applicant to continue operation of station WHOL until August 15, 1953, the date by which Easton alleges its station will be constructed and ready to go on the air. An answer to this opposition was filed by Allentown on July 20, 1953, and a reply by Easton was filed on July 21, 1953.

While as a result of previous proceedings Allentown had received a construction permit, by decision of the Commission dated June 23, 1947, and had subsequently received a license to cover such construction permit, the Commission's decision upon which these grants were based was reversed upon appeal by the Court of Appeals for the

1846-a District of Columbia Circuit. The Commission, in its order of February 16, 1950 designating the two applications for further hearing in accordance with the mandate of the Court of Appeals, set aside the construction permit and the license previously granted to Allentown for the construction and operation of station WHOL but stayed the effectiveness of the stay order insofar as it related to the existing operation of radio station WHOL "pending a final decision in this proceeding." We did this as an act of grace because we felt that during the necessarily extended period before a final decision could be issued in the comparative proceeding there was no reason for depriving the listening audience in Allentown of the radio service they were presently enjoying. On January 31, 1952 the Commission renewed the application for interim operation for station WHOL "until August 1, 1954, or until a final decision in the consolidated hearing on the applications of Allentown Broadcasting Corporation (Docket No. 7180) and of Easton Publishing Company (Docket No. 7179) for construction permits, whichever is sooner." The continuation of authority was also specifically made subject to the limitation that it was "without prejudice to any action that may be taken or any decision rendered in said consolidated hearing."

In its answer to the Easton opposition, Allentown contends that the Commission's decision of July 2, 1953 was not the final decision of the Commission within the meaning of our previous orders and that the Commission can only be considered to have made such a final decision after it has had an opportunity to pass upon any petition for rehearing which might be filed under Section 405 of the Communications Act and the losing party has had a further opportunity to seek judicial review and secure a final determination thereon. We think this contention is clearly unsound and that the "final decision" of the Commission was the decision issued on July 2, 1953 after hearing, the filing of exceptions and oral argument. It is quite true that the

Act authorizes any party to a proceeding, or any person who is aggrieved or whose interests are adversely affected thereby to petition for rehearing. But while the Commission may grant such a rehearing "if sufficient reason therefor be made to appear", Section 405 of the Act makes clear that any such action by the Commission is purely discretionary and that "no such application [for rehearing] shall excuse any person from complying with or obeying any decision or requirement of the Commission or operate in any manner to stay or postpone the enforcement thereof without special order of the Commission." It is clear, therefore, that the Commission, upon the filing of a petition for rehearing by an interested party, may set aside its final decision and stay the effectiveness thereof pending its determination of such a petition, but that in the absence of any such action by the Commission the decision of the Commission against which the petition for rehearing was directed is final and binding. And it is even clearer, we believe, that the right of an interested party to appeal to the courts from a decision of the Commission does not in any way derogate from the finality of the decision appealed from. On the contrary, there is grave doubt as to whether anything but a final decision of the Commission can, except in exceptional circumstances, form the basis of any appeal.

1847 But our determination that the decision of the Commission on July 2, 1953 was our final decision within the meaning of our orders authorizing continued operation of station WHOL does not mean that, in our discretion, we cannot authorize the continued operation of station WHOL to the extent that we believe the public interest so requires. And while we do not believe that in the circumstances of this case it would be appropriate to authorize any further extension of operation for station WHOL, which would interfere in any substantial respect with the rights of the Easton Publishing Company or with

the public interest in affording Easton with an additional local service, we believe that it would be in the public interest to afford the Allentown Broadcasting Corporation a reasonable amount of time to wind up the affairs of station WHOL in an orderly manner. Accordingly, we shall continue in effect the existing operating authority of station WHOL to operate a standard broadcast station in Allentown, Pennsylvania until 12 o'clock Midnight, EDST, on August 31, 1953.

ACCORDINGLY, IT IS ORDERED, That the application of Allentown Broadcasting Corporation for modification of order, for stay and for other interim relief Is HEREBY GRANTED to the extent that station WHOL in Allentown, Pennsylvania is herewith authorized to continue operation under its existing license specifications until 12 o'clock Midnight, EDST, on August 31, 1953, and Is HEREBY DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE
T. J. Slowie
Secretary

(SEAL)

Adopted: July 31, 1953

Released: July 31, 1953

Signed by above; mailed by July 31 1953.—*Mail & Files*

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1848 **Petition for Rehearing**

Allentown Broadcasting Corporation, by its attorneys, herewith petitions for a rehearing of the decision and Order entered in this case, public notice of which was given July 2, 1953, and in support thereof states:

Summary Grounds for Rehearing

1. This petition is filed pursuant to Sec. 405 of the Communications Act of 1934, as amended by the Communications Act Amendments, 1952. The several reasons advanced in this petition for a grant of a rehearing of this case, for convenience of presentation, are subdivided into the following stated points. By reason of the matters and things hereinafter set forth and the important and unusual, if not unprecedented, circumstances of this case, it is earnestly requested that consideration and action upon this petition be had at a meeting of the Commission, at which all members are in attendance.

A. The second hearing Order of February 20, 1950, and the several associated actions thereunder are erroneous, contrary to statutory due process, and at variance with the terms of the remand and judgment governing the further proceeding in this case.

B. The Broadcast Bureau's participation and pleadings in this case unduly prejudiced the rights of Allentown Broadcasting Corporation to a fair decision as is now manifest by the Commission's literal and nearly complete adoption of the Broadcast Bureau's some 1849 160 exceptions, and extraordinary measures are necessary to undo the wrong and to renew the opportunity for a fair determination upon the record in this proceeding.

C. The Commission's decision does not contain sufficient and in some instances correct findings of fact upon matters essential to the determination of a comparative proceeding, nor does it contain adequate or correct ultimate findings upon such matters, and it is lacking in conclusions which are logically and properly supported by adequate findings.

D. The decision fails to contain findings which are addressed with particularity to a determination of the

issues left open on the remand of this case to the Commission for further proceeding.

E. The decision is erroneous in denying the Allentown Broadcasting Corporation's application by consideration of grants of junior applications for stations and services subsequently authorized in Allentown.

F. The Commission's decision is erroneous in reversing the findings and conclusions of the Presiding Officer in the matter of credibility of the testimony of witnesses of Easton Publishing Company.

G. Facts and circumstances pertaining to instruments of authorizations in this case.

H. The decision procedure in this case is erroneous if the Commission meeting had before it undisclosed staff papers, or if the Commission failed to utilize the statutory review staff in this case as required by Sec. 5(e) of the Act.

Statement of the Case

2. This case has been before the Commission since 1945. The applicants have been subject to two full dress hearings. The first hearing was held in May, 1946. Following this, the proposed decision of April, 1947, recommended a grant to Allentown Broadcasting Corporation over
1850 three other competing applicants. The Commission's original decision of June 23, 1947, granted the application of Allentown Broadcasting Corporation. The petition for reconsideration of this action, filed by Easton Publishing Company, was denied in March, 1948.

The second hearing ordered by the Commission, which included all of the original issues in the case, was held during March, May and June of 1951. The initial decision entered by the Presiding Officer in the second hearing called for a grant to Allentown Broadcasting Corporation.

The Commission, at its meeting of June 26, 1953, with two Commissioners not participating and one Commis-

sioner dissenting, entered an Order reversing its original decision and overriding the recommendations of two different examiner reports. This decision, released July 2, 1953, would deny the Allentown Broadcasting Corporation's application and instead grant that of Easton Publishing Company.

Under the second hearing Order (the validity of which is challenged by petitioner), the Commission is called upon to make a choice between Easton Publishing Company and Allentown Broadcasting Corporation. In making this choice, the Commission is required to determine whether Easton Publishing Company or Allentown Broadcasting Corporation is the better qualified applicant upon a consideration and judgment of all factors and differences material to a determination of which grant will better serve the public interest. Such proceeding involves a determination upon the comparative considerations between the two applicants. Has the Commission in this decision arrived at a rational judgment upon all of the relevant factors as to the differences between the parties? Has the Commission's decision in such adversary proceeding been fairly arrived at with evenhanded treatment between the parties as to their private interests, and upon a full and fair consideration of comparative issues? If the Commission's decision is deficient in any of these particulars, is not this a case which warrants rehearing? Is this not a case which warrants a more thorough re-
examination of all aspects of private interests and
1851 public interests to better assure a final and prompt
determination of an unduly long and involved proceeding?

A. Second Hearing Order

3. Petitioner requests that the Commission reconsider and vacate its second hearing Order of February 20, 1950, and proceed to a determination of the case in accordance with the stipulation of the parties and their petitions for

supplemental findings. For the purposes of this petition, Allentown Broadcasting Corporation herewith carries forward the reservation of all such rights as it may have on this matter as set forth in its various pleadings, as identified below, and particularly its petition of June 13, 1950. Petitioner contests the validity of the said second hearing Order and the validity of each and every action associated therewith, i.e.,:

(a) The Commission erroneously denied the motion and stipulation filed June 23, 1949, by all of the parties in this case.

(b) The Commission by its said Order erroneously denied the petition of Allentown Broadcasting Corporation, filed July 15, 1949, for supplemental findings, and erroneously refused to accept submission of the case for decision on the original record as supplemented by the stipulation of the parties.

(c) The Commission's action in setting aside its original decision in this case was erroneous and without authority of law and contrary to the terms and provisions of the decision and mandate entered upon the appeal in this case.

(d) The Commission's Order of a second hearing in this case upon all of the original issues under the misbranding of a further hearing was not in accordance with the mandate and judgment of this case by which the Commission's original decision was *affirmed* upon all issues, except the single matter left open, i.e., the comparative abilities and services of the two applicants in conjunction with community needs.

(e) The Commission's Order, although phrased
1852 in terms of allowing the parties leave to amend their applications, was erroneous when associated with the denial of a request of the parties for a decision upon the case as submitted without further hearing, and operated invalidly as an Order to amend the applications

for the purposes of further hearing on risk of denial if proceeding to a 1951 hearing upon a stale 1945 application, the effect and purpose of which was to obsolete and discard the original hearing and to undertake a new hearing on applications amended or not on all issues—is contrary to statutory due process.

(f) If the Commission's second hearing Order in this proceeding be valid or within the discretion of the Commission, nevertheless its Memorandum Opinion and Order of May 24, 1950, erroneously denied Allentown Broadcasting Corporation's right to amend its application for the purposes of said second hearing as to material facts which transpired in the preceding December, 1949, such refusal being contrary to and in conflict with the Commission's second hearing Order of February 20, 1950, and its interim Order entered March 13, 1950; and the Commission's Order of July 28, 1950, in denying petition of Allentown Broadcasting Corporation for supplemental clarifying order or for reconsideration in the matter of the denial of leave to amend its application was erroneous and contrary to the requirements of statutory due process, for the reasons more fully set forth in said petition of June 13, 1950, which is incorporated by reference and made a part hereof.

As of this date, a review of this record and a consideration of the findings of fact in the Commission's decision fail to show any warrant or justification of the Commission's second hearing Order except as it may have served,
1853 at the undue delay and expense of the parties, as a means of giving the Commission greater latitude in writing a complete new decision around the limited remand of this case. In any event, the second proceeding has resulted in no facts or circumstances more favorable to the Easton Publishing Company than were before the Commission in the original proceeding.

B. The Broadcast Bureau Has Prejudiced a Fair Determination of the Case

4. An entirely new situation is presented by reason of the Commission's allowance of all but 30 of some 160 exceptions filed by the Broadcast Bureau in this case. By allowance of these exceptions, in disregard of the reply thereto filed by Allentown Broadcasting Corporation, the Commission (through four of its members) has associated itself with the Broadcast Bureau's position in the case. The exceptions of the Broadcast Bureau are grossly improper; they constitute an attack upon the office or person of the Presiding Officer in this case; they contain slanderous and impertinent charges; they are replete with the use of slur words; but of even graver concern, they are completely and 100 percent partisan in favor of Easton Publishing Company.

The exceptions of the Broadcast Bureau open up with the amazing contention (P. 2):

"Frankly, . . . the circumstances that new stations have been licensed in Allentown in the intervening five years since the first decision have made this a simple case to decide."

Seventy-one pages and 160 exceptions later, the Broadcast Bureau concludes with the equally amazing statement (P. 71):

"It can reasonably be presumed . . . that there is a greater need for a second medium of local expression in Easton than for a fourth in Allentown."

In the 71 pages of exceptions, there is not a single phrase or syllable favorable to the Allentown Broadcasting Corporation. This pleading is completely filled with arguments in behalf of Easton Publishing Company, and with apologies for its points of weakness. In an all-out effort to discredit the initial decision of the Presiding Officer, the Broadcast Bureau resorts to charges and slurs as

1854 represented by the following assortment: "inconsequential trivia", "meaningless comparisons", "Examiner's dark view", "improperly torture honest and accurate testimony", "Examiner damns the witness", "apparent distortion of such testimony", "reluctant recitation of testimony", "naive", "Examiner casts aspersions", "superfluous", "inappropriate", "incredibly flimsy and prejudicial", "extremely flimsy", "incongruous", "inconsequential", "belittlement of the effort of Easton", "extreme reluctance", "improper reluctance", "unwarranted capsule summary", "unrealistically", "oblique attempt", "disingenously prejudicial to the Easton applicant", "unnecessarily reluctant to find", "hides behind", "improper inferences", "artfully naive", "figment of imagination", "twisted", "tortured". In exception 151, for example, the Broadcast Bureau charges "The Examiner, . . . has chosen the candor route to a grant for Allentown." This is a serious charge and is illustrative of numerous others, but the Commission's decision, for example, granted said exception 151, thus directly associating itself with this improper and wholly partisan pleading.

The Broadcast Bureau, established May 1, 1951, is one of, if not the principal, Bureau within the Commission to which has been delegated rather broad powers, including the function to "participate in hearings involving applications." In other substantial areas, it has been delegated authority to act for and on behalf of the Commission. In such organization, there is a natural tendency to go along with the Broadcast Bureau, particularly in administrative matters. Something different is required in cases of adjudication. In such proceeding, the Broadcast Bureau may not presume to decide the case for the Commission. The Commission should resist any effort in that direction. Such is inconsistent with the function and purpose of presiding officers. It is inconsistent with the function and purpose of the statutory reviewing staff. The Broadcast

Bureau, in its exceptions, mobilized its total resources and influence against the initial decision. The Broadcast Bureau became such an extreme advocate and apologist for Easton Publishing Company that it placed the Commission in the position of either discrediting the Broadcast Bureau or of discrediting the Presiding Officer. The Commission's meeting of June 26, 1953, chose the easier course and directly and completely associated itself with the position of the Broadcast Bureau. The Commission's decision fell in line with the Broadcast Bureau's argument that this is a simple case, by its conclusion that the dominant factor is clearly the need of the people in Easton for a second standard broadcasting service (Par. 15). The two-station thesis in a one station town, given by the Commission as the dominant factor in this case, amounts to one and the same thing as the Broadcast Bureau's contention less delicately put "The relative abilities of competing applicants to serve is meaningless unless the need is first established." (P. 2). The Commission's decision accepts the Broadcast Bureau's argument that the Commission may consider junior grants as conclusive against any possibility of Allentown Broadcasting Corporation being able to establish a need for its station in Allentown.

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The astounding result is reached that after the Commission has ordered a second hearing in this case, the Commission decides that two AM stations in Easton will give that community a choice of AM service, locally originated; that a choice of service from two stations is a dominant characteristic overriding any other consideration, which makes unnecessary a comparison of the relative abilities of the two applicants; and that in any event, the junior grants made by the Commission to which the petitioner had no standing or interest recognized by the Commission to oppose, may be cited and relied upon by the Commission to defeat favorable action upon petitioner's application which, at the time of the hearing, was to establish a second

AM radio station in Allentown to bring to the people of that community, numbering 106,000 as constrasted to Easton's 35,000, a choice of locally originated AM radio service.

Is the fact that the Broadcast Bureau's participation and pleadings in this case are totally partisan in favor of Easton, a matter of improper conduct prejudicial to the rights of Allentown Broadcasting Corporation to a fair determination by the Commission on the issues of this case? This proceeding, considered either on the issue of the remand or on the issues of the second hearing Order, is one clearly involving the comparative abilities of the two applicants in terms of their respective proposals and claims of superiority. Such proceeding is an adversary proceeding interparties. The selection of the better qualified applicant is a matter going to the private interest of the two parties. In such case, the Reviewing Court has stated (*Johnston Broadcasting Co.* v. *FCC*, 175 F. 2d 351, 85 App. D.C. 40 (1949)):

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"We find that the required findings need go no further than the evidence and the proposals of the parties. . . . we think that the Commission may rely upon the parties to present whatever factual material bears upon a choice between them."

We submit that a corrolary of the above stated rule, in the absence of special and limited circumstances, not present in this case, condemns the Broadcast Bureau's pleadings and participation in this proceeding as transcending the bounds of proper conduct. The Broadcast Bureau did not in this instance leave the submission of the case to the parties, but became a champion and advocate for the Easton Publishing Company. Any reading of the Broadcast Bureau's exceptions can reasonably lead to no other conclusion. The prejudicial fact of the position taken by the Broadcast Bureau is demonstrated by the Commission's action by allowing all but a small and insignificant

number of 160 exceptions, each and all of which prejudice Allentown Broadcasting Corporation. The Commission has thus associated itself with the Broadcast Bureau's position that this is "a simple case to decide." If it is such a simple case to decide in 1953, why was it in 1950 such a difficult case to decide as to require a second and complete hearing on all the issues? Is it a simple case that requires a reversal of an initial decision, a reversal of the proposed decision on the initial record, and the entry of a decision in 1953 exactly opposite to that entered in this record in 1948? Is it a simple decision to take away a service which is in
1857 fact being rendered to a population of 314,000 daytime and 92,000 nighttime? Is it a simple case to deny a grant to Allentown Broadcasting Corporation which has gone through two full hearings and two appeals which the Commission itself has thrice found to be rendering a meritorious service, which has in fact demonstrated public acceptance? Is it a simple case to deny the application of Allentown Broadcasting Corporation against which there is not a single demerit on this hearing record, and whose actions speak in deeds? The simple case approach is the error of the original decision wherein the Commission resorted to short cuts in its findings of fact. The simple case technique reflects the same error in the Commission's second decision but in the opposite direction. In the original decision, the Commission, having postulated a greater need for service in Allentown, gave no heed to the comparative claims of the Easton applicant. In the second decision, the Commission, postulating the need for a choice of locally originated services in Easton, sluffs off as inconsequential Allentown's contentions of preferential qualifications and superior claims of service. The simple case technique, the partisan involvement, the due process short cuts, the due process stretch-outs, those are the ingredients of the undue delay involvement and expense, reflecting upon the fairness and public confidence in

agency cases of adjudication. We deny that this is a simple case. In our own interests, we urge that the Commission abandon short cuts, disclaim decision gadgets, and forthrightly make and evaluate adequate and proper findings upon the material differences between the two applicants, and arrive at a rational and logical judgment on all essential matters of comparative consideration.

C. Comparative Considerations Involving the Relative Abilities of the Two Applicants and their Service Proposals.

5. In this case, the material differences between the two applicants, pertinent to the choice of a grant to either, should include a comparative consideration and determination upon the following criteria: (1) local
1858 residence, (2) broadcast experience, (3) integration of ownership and management, (4) program proposals, (5) ability to carry out proposals, (6) reliability, (7) concentration of ownership and control of mass media of communications within the community, (8) support of proposals by disinterested community witnesses, (9) extent of proposed service, (10) relative need of service in terms of other facilities, (11) in this case, the relative suitability of the two corporate organizations to exercise licensee responsibilities, and (12) compliance with engineering standards. These factors go beyond the issue of the bare statutory qualifications.

The Commission's decision erroneously fails to make findings upon the above stated comparison criteria or to evaluate these findings separately and in the aggregate, and fails to arrive at a logical judgment upon the evaluation of these facts. A full and fair consideration of the case, the evidence of record, the initial decision, and the original decisions warrant and require evident findings on the above listed comparison criteria as follows:

There is no substantial difference between the two local applicant corporations and it is hardly a matter of preference either way.

In the matter of broadcast experience, any comparison must favor Allentown Broadcasting Corporation.

On the issue of integrated ownership and management, this difference is conclusively in favor of Allentown Broadcasting Corporation.

To the extent that difference between program proposals can be determined and evaluated on this record, Allentown Broadcasting Corporation warrants a preference.

On the factor of ability to carry out proposals, Allentown Broadcasting Corporation's proposals are in fact its deeds.

Such fact differences between deeds and promises might not be controlling except for the circumstance that there is a substantial variance between the proposals of Easton Publishing Company as set forth in its application and in the original hearing, and as revised and modified in the second hearing, without benefit of an amendment to
1859 its application, and its proposals are under question as to reliability and credibility of its principal witnesses.

In the absence of any factor clearly unfavorable to Allentown Broadcasting Corporation, it would seem controlling against Easton Publishing that within the Easton community it owns and controls the only newspaper, the *Easton Express*, and now runs and operates the only television station in Easton. Its only minor source of competition is from Station WEST, against which Easton Publishing Company operates an FM station and here seeks a competitive AM station.

In the hearings held in Allentown, six leading citizens of that community testified in support of its service, all of whom were disinterested and of high public standing in the community. In the hearings held in Easton, no disinterested resident of Easton gave testimony in support of the Easton Publishing Company.

The relative populations of Allentown and Easton are 107,000 and 36,000 respectively. The rate of growth in

1940 compared to 1950 is in favor of Allentown over Easton in the order of 10 percent to 6 percent. The population serviced by Allentown Broadcasting Corporation day and night is 314,000 and 92,000, whereas the Easton station would service 212,000 and 57,000.

There is no substantial difference between the two communities with respect to service from outside stations.

The Allentown Broadcasting Corporation application proposed a second station in Allentown and its Station WHOL was in fact the second full time station to be put into operation in the city of Allentown. The Easton Publishing Company proposes a second AM station in Easton. The Allentown Broadcasting Corporation has no interests or activities other than the operation of Station WHOL.

66.91 percent of the stock of Easton Publishing Company is held in three different trusts. There is a 1860 consequent division to a very substantial degree between beneficial ownership and legal title and almost a complete separation between management and ownership either beneficial or legal. No such diffused condition exists with respect to Allentown Broadcasting Corporation, and this difference is a matter which warrants comparative consideration and a conclusion preferential to Allentown Broadcasting Corporation.

On the matter of compliance with the Commission's standard of good engineering practice, Allentown Broadcasting Corporation must be preferred, whereas in the case of Easton Publishing Company, it fails substantially to comply with the standards in their requirement for service to the metropolitan area, and for a satisfactory signal over the business and industrial areas, which the Commission's decision would waive and condone, without benefit of a comparative evaluation of these matters, which as to each requirement would be preferential.

On an aggregate comparison and evaluation of the above listed criteria and differences, the evidence in this record requires a conclusion that Allentown Broadcasting Cor-

poration is at least equal in all and is decidedly to be preferred on the essential issues of difference; that in no instance is Easton Publishing Company entitled to be given a preference; and that the point of concentration over mass media of communications by Easton Publishing Company is a controlling factor which, taken into consideration with all others, impels a denial of its application, considered on a comparative basis with that of Allentown Broadcasting Corporation.

6. The Commission's findings are improper to the extent that they are based upon testimony of witnesses of Easton Publishing Company, whose lack of candor and credibility has been determined by the Presiding Officer. The Commission's findings are improper to the extent that they contain percentage analyses of program classifications. Such arbitrary and indefinite program classifications cannot support any findings or conclusions as to the quality or character of actual program services, nor can such quantitative program classifications be relied upon
1861 to influence a comparative consideration of proposed services. The initial decision contains a forthright and reasonably able attempt to evaluate comparatively existing program services with proposed program services qualitatively and by actual character and content and time of broadcast. If this evidence is to be relied upon one way or the other, it should be made the subject of proper and detailed findings of fact. Either the percentage analysis recitals in the Commission's decision should be deleted or proper and adequate findings as set forth in the initial decision should be carried forward and evaluated in ultimate findings of the Commission's decision.

D Noncompliance with the Judicial Mandate

7. Not only is the Commission's second hearing proceeding contrary to the mandate and judgment governing this action, but the Commission's decision erroneously fails

to set forth clearly and distinctly findings and conclusions addressed to the particular issue upon which the case (being *affirmed* as to all other points) was returned to the Commission for further proceeding.

Since the Commission in its second decision reversed its original decision, the Commission's latest decision, as a minimum, should set forth (a) the new, different or additional findings on the comparative issue of relative needs or abilities; (b) the ultimate facts upon which the Commission relies for a reversal of its original decision, from which the parties or the reviewing Court on appeal may ascertain the matters of fact or law controlling the further proceeding under the mandate. Instead the Commission treats the matter as a new trial and on all issues without any specific regard or attention to findings or reasoning addressed separately and specifically to the Court's decision. The initial decision, contrary to the Commission's decision, made a direct and forthright attempt to set forth adequate findings and conclusions in response to the Court's mandate. E.g. par. 6 supra.

The Commission's decision fails to set forth any rational basis for a determination of the relative needs of
1862 the communities in conjunction with the relative abilities of the two applicants considered on a comparative basis. Instead the Commission's decision postulates that a community, such as Easton, should have at least two AM radio broadcasting stations so as to have a choice of locally originated service. This is the controlling thesis of the decision and is the expression of the philosophy rather than a determination of relative needs. In its eagerness to bring two stations to Easton as a means of distributing facilities among the communities of this metropolitan area, the Commission seems to be oblivious of the fact that Bethlehem, a city twice the size of Easton, has only one station.

The Commission's decision, insofar as it purports to predicate its decision upon a distribution of radio facilities

and services between the two communities, erroneously fails to take into account and give consideration to its recent action in authorizing a television-radio broadcasting service to Easton, which is now in service. A television station, unlike an FM broadcast station, under existing conditions of public service and acceptance, is certainly a radio service which cannot be disregarded in any proper consideration of comparative needs of communities.

The Commission's decision, to the extent that it may be predicated upon considerations of Sec. 307(b) of the Act, misapplies and erroneously interprets that provision. The Commission reads into this provision as limitation that it is to be considered only in a case involving electrical interference. In such case, the Commission considers that it has unlimited discretion to make its determination either way and on any basis. The Commission considers that this provision of the Act overrides any other consideration of the Act or regulation. The Commission fails to consider this provision as merely a guide to the legislative standard of public interest, convenience and necessity, but as one factor among others to be taken into consideration in applying comparative criteria to comparative abilities and service proposals between competing applicants. To illustrate, if the Commission were to make an uncon-
1863 tested grant next week to XYZ applicant at Easton, the Commission for this reason under its interpretations of Sec. 307(b), would reverse its decision in this case, granting the Easton Publishing Company's application. The Commission interprets this section as requiring a grant to Easton without considering other comparative criteria as to the abilities and service proposals of Allentown Broadcasting Corporation. The Commission would use this section to justify a grant to Easton even at the cost of waiving and condoning Easton Publishing Company's noncompliance with the Commission's regulations as to the adequacy of service to the industrial and metropolitan areas.

E. Erroneous Consideration of Junior Grants

8. The Commission's decision in denying the application of Allentown Broadcasting Corporation, considers and relies to a substantial degree upon the existence of facilities and services rendered by grants of junior applications for AM broadcast stations in Allentown. At the time of the original proceeding, Allentown Broadcasting Corporation was seeking authorization for a second station in Allentown. That was the issue upon which Allentown Broadcasting Corporation was entitled to a hearing and determination upon the original record completed in May, 1945. After that record was closed, the Commission made a grant for a daytime station, WKAP, which went in service August, 1947. Station WHOL commenced operations on September 3, 1948, and thereby in fact became the second full time station in Allentown. Thereafter in the spring of 1949, the Commission granted authorization for an additional station, WAEB, to operate full time in Allentown. Subsequently in December, 1950, daytime station WKAP was granted a modified authorization adding nighttime service. These are the facts. The Commission's decision, contrary to these facts, erroneously considers this proceeding as if Allentown Broadcasting Corporation were seeking to become the fourth full time AM station in Allentown.

While there is nothing on this record to question
1864 the lack of public acceptance by Allentown of four AM stations, it is our view that the Commission disregards the essential requirements of statutory due process in citing its own actions in making three junior grants to Allentown as reasons for denying the application of Allentown Broadcasting Corporation. It is to be presumed that the Commission, in making the three junior grants above stated, must have taken into account the proceeding and authorization upon the application of Allentown Broadcasting Corporation. If on May 3, 1948, when

the Commission granted a full time authorization to WAEB, it must have determined that there was a need for that authorization in addition to the then outstanding authorizations, including that of Station WHOL. If, in December, 1950, the Commission granted Station WKAP nighttime hours of operation, it must have presumed to have decided that these facilities were needed in the public interest in addition to those then authorized and in existence, including the authorization held by Station WHOL.

A party's right to a hearing and a determination upon the record of that hearing are empty gestures if the Commission can make subsequent grants, against which such party has no standing or interest recognized by the FCC to oppose, and yet cite its subsequent actions in making such junior grants as reasons for the denial of such application. This contention does violence to the basic rights of statutory due process.

9. The Commission has erred in giving consideration to the junior grants of facilities to Station WKAP and Station WAEB, or in failing to accord petitioner opportunity to be heard on a comparative basis in opposition to the subsequently proposed services by Station WKAP and Station WAEB. Specifically the Commission's Order of October 6, 1950, denying the petition of Allentown Broadcasting Corporation for rehearing in opposition to the application of WKAP, Inc., for additional facilities in Allentown, is erroneous.

1865 F. Credibility of Witnesses

10. The Commission's decision in this case overruled the findings and conclusions of the Presiding Officer that the principal witnesses for the Easton Publishing Company were found lacking in candor and credibility upon testimony in this case. The Presiding Officer found and concluded that Mr. J. L. Stackhouse, President, Treasurer and

Director of Easton Publishing Company, and its principal witness in this case, was, as to several matters, evasive and lacking in candor and failed to make frank and honest disclosures in testimony in this case. The Presiding Officer also found that Mr. Nelson S. Rounsley, the Station Manager of Easton Publishing Company, was evasive and indefinite on matters of program proposals.

The Commission's decision recites that it independently evaluated the testimony relating to the matters associated with the conclusions of lack of candor and credibility and concluded that the testimony of these witnesses gives an over-all appearance of consistency, candor, and straightforwardness.

The Commission should stop and consider very carefully what it has done in this case, and the effect of what it has done on other proceedings before the Commission. The Commission's decision pays no heed to the high responsibility of presiding officers in evaluating testimony of witnesses who appear before them. If this decision stands, is it not in effect telling the Commission's presiding officers that they should not concern themselves with the credibility of witnesses? Or except where the lack of veracity can be proven by the printed word.

Candor and credibility of witnesses should be regarded by the Commission as a matter of extraordinary importance since the Commission, in a large measure, deals in matters of promissory representations with respect to the future as contrasted with past events. In these proceedings particularly, the Presiding Officer should evaluate
1866 the accuracy and credibility of the testimony of witnesses by observation and a studied appraisal of their demeanor and conduct. In the matter of candor and credibility, the Presiding Officer must be the deciding officer. The Presiding Officer's evaluation and conclusions on these matters should not be disturbed or set aside except for the most persuasive and compelling reasons. Any other course goes against the fundamentals

of judicial experience in conducting cases of adjudication. Even in quarters not overly sympathetic with the trial examiner system, the Presiding Officer's nearly conclusive dominion in the matter of accuracy and credibility of witnesses has been acclaimed as the signal proof of a sufficient independence and impartiality of Sec. 11 trial examiners. *The Status of the Trial Examiner in Administrative Agencies*, 66 Harv. L. Rev. 1065.

It was clearly the duty of the Presiding Officer in this case to weigh the acuracy and credibility of the testimony of these witnesses. It is not an easy or pleasant task for any presiding officer to be forced to the conclusion that a witness, however prominent or proper in other respects, was, as to testimony given in this case, lacking in candor and credibility. Insofar as this conclusion of the Presiding Officer is predicated upon the demeanor and conduct observed by the Presiding Officer, the Commission may not disregard that conclusion or substitute for it a different conclusion in consideration of the printed testimony. The Commission's decision in this case is clearly erroneous in disregarding and reversing the Presiding Officer's conclusions in the matter of lack of candor and credibility of the principal witnesses of Easton Publishing Company.

And in any event, the questioned credibility of the principal witnesses of the Easton Publishing Company is a factor which must be weighed on a comparative basis with the unquestioned reliability of the witnesses and testimony of the Allentown Broadcasting Corporation.

G. Facts as to Authorizations and Actions

11. The Commission in this case finds itself in the anomalous and compromising position of having
1867 issued, delivered, and outstanding, two conflicting instruments of authorizations. Allentown Broadcasting Corporation holds a regular radio broadcasting station license, dated February 2, 1949, for the full license term ending February 1, 1952, which has been continued

in effect by the timely filing on October 30, 1951, for a renewal of its radio broadcasting station license. Also Allentown Broadcasting Corporation holds a telegraphic authorization, dated January 31, 1952, stating:

"Authority under which Station WHOL is presently operating is continued until August 1, 1954, or until final decision in the consolidated hearing in the applications of Allentown Broadcasting Corporation (Docket 7180) and of Easton Publishing Company (Docket 7179) for construction permits, whichever is sooner."

We are now informed that the Commission has issued and delivered a construction permit to Easton Publishing Company pursuant to the Commission's decision and Order of July 2, 1953. Easton Publishing Company in the *Easton Express*, dated Tuesday, July 21, 1953, on the front page of the home edition, publishes the fact that the Commission has issued a construction permit and "The Easton Publishing Company has started construction of the facilities with a view to putting the new AM station on the air at the earliest possible date." Under the Commission's rules and practice, the grantee of a construction permit may, upon mere notice to the Commission, commence what is called equipment tests, which involve actual radio transmission on the assigned frequency.

If conditions which prevailed prior to 1927 in the radio field were characterized as chaos, the condition which prevails in this case is regulated chaos.

Thus in this proceeding, characterized as one upon conflicting and mutually exclusive applications, the Commission has blithely granted and delivered instruments of authorizations to both parties authorizing their simultaneous operation.

Although Allentown Broadcasting Corporation constructed its station in 1948 without the benefit of a
1868 completely final determination of the case, it did not commence construction until after there was a final

determination of the matter before the Commission following the Commission's denial of petitions for rehearing. Also unlike the Easton Publishing Company, commencement of operations by the Allentown Broadcasting Corporation on September 3, 1948, did not disrupt any existing service.

The published admission by Easton Publishing Company that it has already commenced the construction of this station prior to a final determination of the case before the Commission, raises a serious question as to the eligibility of Easton Publishing Company by that reason to become a licensee of such station. The Commission is precluded by express provision of Sec. 319(a) of the Act from granting a license to any person for the operation of any station, the construction of which is begun without the benefit of the grant of a permit for its construction. Such grant may be valid only if supported by a final decision of the Commission.

12. On examination of instruments of authorization issued in this case in terms of applicable statutory provisions and of actions of the Commission and of the parties thereunder, we are obliged to advance the contention, and urge a determination of the point, that this proceeding may have become moot by reason of the uncontested action of the Commission on February 2, 1949, in issuing a regular license to Allentown Broadcasting Corporation for the operation of Station WHOL for a full license term.

The Act does not contemplate that the same party may be both an applicant for a construction permit (Sec. 319) and a licensee (Sec. 309) for the same facility at the same time and place, which is the strange status of this proceeding.

By operation of the terms of the statute, did not the construction permit issued to Allentown Broadcasting Corporation become a completed and wholly executed instrument by force of the acceptance on September 1, 1948, of

its application for regular license and the Commission's statutory determination, grant and delivery of a
1869 station license to Allentown Broadcasting Corporation for the regular operation of Station WHOL for a full license term, which action and grant, though open to successful challenge, nevertheless became final by lapse of time and failure to protest.

The purpose of the two-step permit license procedure was to allow the Commission opportunity before granting a regular license to make sure that the party had completed construction of the station in accordance with the terms of the permit and Act. Since Allentown Broadcasting Corporation has been the holder of a regular radio station license since February 2, 1949, can it now be considered an applicant for a permit to construct that station?

The Commission's action and determination of February 2, 1949, under Sec. 309 of the Act, in granting the WHOL license, has not been disturbed. The FCC Order in the above entitled proceeding of February 20, 1950, operated only to set aside the decision of June 23, 1947, granting a construction permit.

The answer to this contention would seem to depend upon whether the Commission had statutory authority (in the absence of protest) to enter the action of February 2, 1949. If this was a valid action, WHOL is a statutory licensee. If not, its license is subject to the infirmity of the construction permit.

If, upon the record in this case, it is determined that this proceeding as to Allentown Broadcasting Corporation is one upon an application for a construction permit, petitioner is aware that its authorization is lacking the benefit of a final determination in the case within the terms of the mandate and judgment entered upon the original proceeding. And subject to such determination, petitioner, as a competing applicant for a construction permit, does not assert any legal claim to preference by reason of its actual operation, nor does it for this purpose raise any question

that its continued operation is to be without prejudice to whatever action may be entered upon a final determination in this case.

1870 II. Lack of Due Process in Decision Procedure

13. Allentown Broadcasting Corporation has reason to believe that the Commission, in reaching its decision in this case, failed to permit its statutory review staff to perform the functions and duties as provided in Sec. 5(c) of the Communications Act Amendments, 1952, and that in substitute or in lieu thereof, other staff members prepared papers on the case which were submitted to the Commission meeting(s) considering this case, which papers were not disclosed to the parties or included in the docket files of this proceeding.

Petitioner's counsel, by letter of July 24, 1953, to the Chairman of the Commission, sought to verify the existence of any such papers and requested copies or right of inspection for use in connection with the preparation of this petition. Request for such papers was denied July 29, 1953.

On the assumption that such undisclosed papers were in existence, it is contended that the decision process in this case is in contravention of statutory requirements. One of the fundamental purposes of the Administrative Procedure Act was to require that agencies, in cases of adjudication, make their determinations upon the record in the case and without resort to undisclosed staff papers. The exclusive record for decision may not properly include the consideration of memoranda and testimony summaries prepared, for example, by the office of the General Counsel. The Attorney General's Committee final report, states (p. 72):

"The parties, then, are entitled to be apprised of the data upon which the agency is acting. They are entitled not only to refute but, what in this situation is usually more important, to supplement, explain, and give different

perspective to the facts upon which the agency relies. In addition, upon judicial review, the court must be informed of what facts the agency has utilized in order that the existence of supporting evidence may be ascertained."

As to this agency, the 1952 Amendment, Sec. 409(c)(3) provides:

"No person or persons engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court in any case arising under this Act, shall advise, consult, or participate
1871 in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, except as a witness or counsel in public proceedings."

Any undisclosed staff memoranda submitted to the Commission for consideration in connection with any meeting or decision involving this case is clearly in violation of the above quoted provision.

This, considered together with the prejudicial and injudicious pleadings of the Broadcast Bureau in this case as above set forth, and coupled with the presumed failure of the Commission to utilize the services of the statutory review staff, are compelling circumstances that the Commission's decision be vacated and the case be re-examined in compliance with statutory due process and purged of the several deficiencies herein set forth.

The Communications Act Amendments, 1952, introduced substantive, organizational, and procedural changes. That Act became effective upon July 16, 1952, except for procedural changes in certain cases. One of the organizational changes was the establishment of a review staff. By this provision, the adjudicatory functions of the Commission are by this Act confined to the Commission's hearing officers, the review staff, and the Commission. The apparent circumvention of the review staff from perform-

ing the statutory functions and duties in this case and the alleged performance of such duties by other staff personnel was clearly contrary to the express provisions of exclusion and inclusion of the Act.

WHEREFORE, petitioner prays for the following relief, severally, independently, and in the alternative:

1. Petitioner requests that upon the filing of this petition, it be granted interim action and relief as follows:

A. That the Commission grant petitioner's Application for Modification of Order, for Stay or for Other Interim Relief, filed in this case July 10, 1953.

B. That the Commission enter an Order recalling or cancelling construction permit issued to Easton Publishing Company prematurely prior to a final grant of its application.

1872 C. That the Commission take appropriate action to include in the docket files of this case any staff papers or memoranda submitted to or considered at any Commission's meetings upon or related to this proceeding.

2. That the Commission, upon a consideration of this petition, grant a rehearing of the case for the reasons above stated.

3. That the Commission vacate its decision and Order of July 2, 1953, and that it vacate its Order entered in this case February 20, 1950, and each of the subsidiary Orders and actions associated therewith.

4. That the Commission strike or expunge from the record the exceptions filed by the Broadcast Bureau in this case with leave of the Broadcast Bureau to refile appropriate exceptions consistent with its function in the public interest aspects of the proceeding, and that the parties be allowed opportunity for a re-argument of the case before the Commission

5. That petitioner be granted such other interim or final relief as may be appropriate in the proceeding.

Respectfully submitted,

ALLENTOWN BROADCASTING CORPORATION

By .....

DONALD C. BEELAR

.....

CHARLES R. CUTLER,
Attorneys,
800 World Center Building,
Washington 6, D. C.

1923

Broadcast License Div.
BROADCAST
AURAL FACILITIES

Wire to Easton Publishing Co. from FCC.
August 17, 1953

AUGUST 17, 1953
EASTON PUBLISHING COMPANY
RADIO STATION WEEX
30 NORTH FOURTH STREET
EASTON, PENNSYLVANIA

IN CONNECTION WITH CONSTRUCTION PERMIT RECENTLY GRANTED TO WEEX PLEASE BE ADVISED THAT ANY EQUIPMENT TESTS CONDUCTED THEREUNDER BETWEEN NOW AND MIDNIGHT AUGUST 31 MUST NOT BE CONDUCTED DURING SUCH TIMES AS STATION WHOL IS OPERATING.

WM. P. MASSING, ACTING SECRETARY
FEDERAL COMMUNICATIONS COMMISSION

Day Letter—Collect
2:25 p.m.
cc: General Counsel
Miss Iehl
E/C—Philadelphia, Pennsylvania
HLK:bn/af:B

* * * * * * * * * *

1924 **Letter from Eliot C. Lovett to FCC.**
August 17, 1953

Mr. T. J. Slowie, Secretary
Federal Communications Commission
Washington 25, D. C.

Dear Sir: Miss Iehl

Notice is hereby given that the Easton Publishing Company will, pursuant to Rule 3.167, commence equipment tests relating to the construction of standard broadcast Station WEEX, Easton, Pennsylvania, early Thursday, August 20th. These tests will be conducted during the experimental period as defined in Rule 3.10.

A copy of this notification is being sent to the Engineer in Charge of Radio District #3, U. S. Customs House, Philadelphia, Pennsylvania.

Very truly yours,

EASTON PUBLISHING COMPANY

By ELIOT C. LOVETT
Its Attorney

* * * * * * * * * * *

1925 **Telegram to Easton Publishing Co. from FCC.**
August 18, 1953

August 18, 1953

EASTON PUBLISHING COMPANY
RADIO STATION W E E X
30 NORTH FOURTH STREET
EASTON, PENNSYLVANIA

RELET ATTORNEY 17. NO OBJECTION CONDUCT EQUIPMENT TEST NEW STATION DURING EXPERIMENTAL PERIOD ACCORDANCE SECTION 3.167 RULES AND PERMIT BP-4212. NECESSARY NOTIFY ENGINEER IN CHARGE YOUR DISTRICT AFTER TEST COMPLETE AND STATION READY FOR INSPECTION. NOTE PROVISION COMTEL 17 LIMITING TESTS TO PERIODS WHEN WHOL IS OFF AIR.

WM. P. MASSING
ACTING SECRETARY, FCC

* * * * * * * * * * *

By the Commission: Commissioner Doerfer not participating.

1. The Commission has before it for its consideration a petition for rehearing of the July 2, 1953 decision and order in this case filed on July 31, 1953 by the Allentown Broadcasting Corporation. An opposition to the petition was filed by the Easton Publishing Company on August 7, 1953 and a reply to the petition for rehearing was filed by the Chief, Broadcast Bureau on August 10, 1953. Allentown also filed a petition for stay of the July 2, 1953 decision which has been opposed by Easton.

2. Allentown advances as its first point the alleged invalidity of the Commission's order of February 20, 1950 which, pursuant to the mandate of the Court of Appeals in *Easton Publishing Co.* v. *Federal Communications Commission*, 175 F 2d 344, set aside its previous decision of July 14, 1947 in this proceeding and designated the applications of Easton and Allentown for further hearing upon eight specified issues. It alleges that the Commission, in adopting this hearing order, improperly rejected a procedure whereby further determination of the proceeding would be made on the basis of a stipulation which had been agreed to by the parties, and their petitions for supplemental findings. But this very argument was made by the petitioner to the Court of Appeals in a petition for writ of mandamus filed on March 23, 1950 and was expressly rejected by the Court of Appeals in a decision of October 23, 1950 which relied upon the decisions of the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134 and *Fly* v. *Heitmeyer*, 309 U. S. 146. See *Easton Publishing Co.* v. *Federal Communications Commission*, 185 F 2d 987. Petitioner also objects to orders of the Commission of May 24, 1950 and July 28, 1950 which rejected its request to amend its application in certain respects. It presents no new reasons why it believes the Com-

mission's determinations with respect to this matter were erroneous and we know of no reasons to change our position as set forth in these orders.

3. Allentown next raises, as grounds for rehearing, a claim that the action of the Broadcast Bureau of this Commission in filing exceptions objecting to various aspects of the initial decision in this case was improper and prejudiced a fair determination of the case. We see no necessity for dignifying this allegation with any extended discussion. Suffice it to say that in our opinion the action of the Broadcast Bureau in this case was in no sense improper.

1897 4. In its third allegation of error, Allentown complains that the Commission did not, in its final decision, make comparative findings between the two applicants with respect to some 12 factors which Allentown alleges were relevant to a determination in this proceeding. In our opinion, this contention is based upon a complete misconception of the nature of the instant proceeding. This is not a case in which the Commission is called upon to consider the comparative qualifications of two or more applicants proposing to serve the same community; instead, it is a case in which one of the applicants proposes to serve Easton, Pennsylvania, and the other Allentown, Pennsylvania and neither would provide service to the other community. Under such circumstances, the primary determination to be made is that required by Section 307(b) of the Communications Act; namely, how best to distribute licenses among the several states and communities as "to provide a fair, efficient and equitable distribution of radio service to each of the same." In the present case, having determined that Easton, Pennsylvania with only one standard broadcast station was in substantially greater need of a second local facility than the Allentown community which already has four standard broadcast stations, we went on to consider, in accordance with the mandate of the Court of Appeals in the first Easton decision, which of the two ap-

plicants would best serve the needs of Easton, Pennsylvania and found that the Easton Publishing Company was such applicant. But we also recognized that in spite of the demonstrable greater need of Easton than Allentown for a new standard broadcast facility, the public interest would not necessarily be served by granting the only application for that city if the record were to have demonstrated that the Easton applicant was unable to provide adequately for the demonstrated needs of the Easton community. We accordingly went on in our decision to point out the reasons for our belief that the Easton Publishing Company station would in fact serve the needs and interests of the Easton community for a choice between locally originated programs which had led us in the first instance to favor a grant to Easton rather than Allentown.

5. Petitioner also suggests that the Commission's 307(b) determination was not in accordance with the mandate of the Court of Appeals. But it is perfectly clear that this determination, based as it was upon the greater need of Easton for a second competitive transmission facility than that of Allentown for a fifth station in the community, was not only consistent with the decision of the Court of Appeals in the Easton case[1] but was identical in nature with the determination of the Commission in the *Northwestern Ohio Broadcasting Corporation* case, 3 Pike & Fischer, R.R. 1945, which was affirmed by the Court of Appeals subsequent to its decision in the case. *Sky Way Broadcast-*
1898 *ing Corp.* v. *Federal Communications Commission*, 176 F 2d 951. Petitioner's contention that the Commission should have considered that Easton had two outlets for local expression because of the existence of an outstanding construction permit for a television station in Easton is

[1] Thus the Court, clearly foreshadowing its subsequent decision in *Sky Way Broadcasting Corp.* v. *F.C.C.*, 176 F 2d 951, stated that the complex considerations applicable in making 307(b) determinations where both communities have a multiplicity of services would not be necessary where one community has no service or no local transmission facilities. *Easton Publishing Co.* v. *F. C. C.* 175 F 2d.

obviously unsound; a similar contention that the Commission had failed to give due weight to FM stations in the communities in making a 307(b) determination in a standard broadcast (AM) case was expressly rejected by the Court of Appeals in the first appeal in this proceeding. While television is of course an important medium of mass communications the existence or lack of existence of this visual media can hardly be determinative of which of two communities is most in need of an additional standard broadcast facility to provide aural broadcast service. Finally, the contention that the Commission's 307(b) determination between Easton and Allentown is erroneous because of the Commission's consideration of grants for standard broadcast stations made subsequent to the completion of the original hearing in 1945 is, as indicated above, clearly unsound in the light of the Court of Appeals' decision of October 23, 1950 in this very proceeding.

6. Nor are we persuaded by the contention in the petition for rehearing that the Commission acted improperly in rejecting, on the basis of a careful review of the record in the case, the conclusions of the hearing examiner with respect to the candor or credibility of certain of the witnesses for the Easton Publishing Company. In reaching our determination that the record in the case did not support a finding of lack of candor or credibility, we, of course, gave the most careful consideration to the conclusions of the examiner on these points. But we were unable to find that the matters upon which she relied for reaching these determinations supported her conclusions.[2] We recognize fully the weight that must be given to examiners' determinations in matters of this sort under the ruling of the Supreme Court in the *Universal Camera* case. *Universal Camera Co.* v. *National Labor Relations Board*, 340 U. S. 474. However, nothing in that case nor any of the decisions or statutes with which we are familiar deprives this

[2] It is to be noted that the examiner's determinations as to candor and credibility were based primarily, if not exclusively, upon her interpretation of the testimony offered rather than the demeanor of the witnesses involved.

Commission of its responsibility for making its own independent evaluation of the evidence of record upon which material conclusions of this nature are based.

7. Finally, the petitioner alleges that it has reason to believe that the Commission in its consideration of the instant proceeding acted in violation of Sections 5(c) and 409(c)(3) of the Communications Act of 1934, as amended by the Communications Act Amendments, 1952, 66 Stat. 111. This allegation is apparently based upon the contention that if the Commission in its consideration of this case availed itself of the assistance of any members of its staff, other than those assigned to the Office of Opinions and Review, that it operated contrary to the provisions of the Communications Act referred to above. It is sufficient, in answer to this claim, to indicate that the instant proceeding
1899 is one in which the hearings commenced prior to the date of the enactment of the amendments to which petitioner referred, and that, accordingly the Commission was not required to and did not apply the procedural changes effected by such amendments, including the separation of functions provisions relied upon by the petitioner, to the instant proceeding. See Sec. 19(1) Communications Act Amendments, 1952, 66 Stat. 722 It is hardly necessary to add that no allegation has been made by petitioner, or in fact could any be supported, that the Commission's consideration of this case deviated in any manner from the rules which it has prescribed for consideration of matters not affected by the Communications Act Amendments, 1952.

8. There remains for consideration only the contention of petitioner that the action of the Commission in granting on February 2, 1949 a station license to the Allentown Broadcasting Corporation in some manner acts to render moot the entire comparative proceeding. We think it is clear that the authorization granted to Allentown on February 2, 1949 cannot possibly affect the status of this case. That authorization was granted at a time when the decision

granting the construction permit, upon which the license was necessarily based, was still upon appeal in the Court of Appeals for the District of Columbia Circuit and was obviously and necessarily contingent upon the outcome of that appeal. Subsequent to the decision of the Court of Appeals on May 4, 1949, which found that the grant of a construction permit to Allentown Broadcasting Corporation had been fatally defective and remanded the case to the Commission for further proceedings, the Commission by order of February 20, 1950 expressly set aside its decision of June 23, 1947 which had granted the construction permit to the petitioner. The effect of this action was necessarily to set aside both the construction permit and the station license issued to petitioner on February 2, 1949. The fact that the Commission stayed "the effectiveness of the above order setting aside the decision insofar as it withdraws *the authority* of the Allentown Broadcasting Corporation *to operate station WHOL* . . . pending the further hearing in this proceeding and the release of a final decision herein" (emphasis added) makes clear beyond doubt that the Commission in the February 20, 1950 order was referring to the license as well as the construction permit. And the fact that the Commission as a matter of grace permitted petitioner to operate station WHOL pending the final decision in this case clearly in no way acts as an estoppel upon the Commission preventing it from reaching the determination which it did in its final decision.

9. The petition for stay filed by Allentown Broadcasting Corporation requests us to stay the effective date of the Commission's decision of July 2, 1953 until 30 days after our disposition of the petition for rehearing. We have passed upon a similar request made by Allentown in our Memorandum Opinion and Order of July 31, 1953. For the reasons stated therein and in the light of our decision on the petition for rehearing, we believe that the public interest will best be served by adhering to our decision of July 31, 1953 which authorized the continued operation of

radio station WHOL only until 12 o'clock Midnight (EDST), August 31, 1953.

1900 10. ACCORDINGLY, IT IS ORDERED; That the petition for rehearing in the above-entitled action filed on July 31, 1953 by the Allentown Broadcasting Corporation and the petition for stay, for the reasons set forth above, ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WM. P. MASSING
Wm. P. Massing
(Seal) *Acting Secretary*

Adopted: August 18, 1953
Released: August 19, 1953

Signed by above Mailed by Aug. 20, 1953 Mail & Files.

* * * * * * * * * * *

893 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

(Broadcast)

Allentown, Pennsylvania

Monday, March 51, 1951

Docket No. 7179

In the Matter of:
EASTON PUBLISHING COMPANY
Easton, Pennsylvania
Call Letters: New

Docket No. 7180

ALLENTOWN BROADCASTING CORPORATION
Allentown, Pennsylvania
Call Letters: New

Other participants:
WHUM, Reading, Pennsylvania

The above-entitled matter came on for further hearing, pursuant to notice, in the Grand Jury Room, Court Hou[illegible],

Allentown, Pennsylvania, at 10:00 a.m., before Elizabeth C. Smith (The Presiding Officer).

Appearances:

On behalf of Easton Publishing Company:

Eliot C. Lovett, Esq.,
729 15th Street, N.W., Washington, D. C.

894 On behalf of Allentown Broadcasting Corporation:

Reed T. Rollo, Esq.,
of Kirkland, Fleming, Green, Martin, and Ellis,
World Center Building, Washington, D. C.

and

Charles G. Helwig, Esq.,
502 Hamilton Street, Allentown, Pennsylvania

On behalf of the Federal Communications Commission:

Sol Schildhause, Esq.

PROCEEDINGS

The Presiding Officer: Let the hearing come to order.

This is a further hearing before the Federal Communications Commission in a consolidated proceeding involving the applications of Easton Publishing Company, Docket No. 7179, and Allentown Broadcasting Corporation, Docket No. 7180.

This hearing is held subsequent to the remand of this proceeding from the United States Court of Appeals for the District of Columbia circuit, and is particularly upon those issues set forth in the Commission's order released on February 20, 1950.

* * * * * * * * * * *

896 Mr. Rollo: At the outset I would like to reserve, on behalf of the Allentown Broadcasting Corporation, whatever rights we may have to object to the procedure of a further hearing in this matter, and also to reserve an objection to the consideration by the Commission in arriving at a final decision in this case of any program service being rendered by the stations in this area

authorized by the Commission subsequent to the closing of the original record. I simply want to have those reservations on the record.

The Presiding Officer: Very well, Mr. Rollo, they will be noted. It might also be noted that the United States Circuit Court of Appeals for the District of Columbia has had that particular matter before it, too, and it has held that the Commission has the power to holding this hearing.

* * * * * * * * * *

1354 **Donald V. Hock,**

called as a witness on behalf of the Allentown Broadcasting Corporation, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Helwig:

Q. What is your full name? A. Donald V. Hock.

Q. Where do you reside? A. 2915 Parkway Boulevard, Allentown, Pa.

Q. Are you a practicing lawyer? A. I am.

Q. Do you hold any elective position in the City of Allentown? A. I am presently the Mayor of the City of Allentown.

* * * * * * * * * *

1364 Q. I have called to your attention, Mayor, a number of public service programs that were carried exclusively by Radio Station WHOL between September, 1948 and January 1, 1951. In your opinion as Mayor of the City of Allentown and familiar with the citizens of this community, would you state that these services and these programs filled a definite need in the community?

* * * * * * * * * *

1365 The Witness: I think that these programs to which you have referred have filled a very definite need, insofar as public interest is concerned, insofar as the public enjoyment of this type of programs, or the seasonal programs is concerned, or certain types of programs of importance to the public at large on certain occasions.

By Mr. Helwig:

Q. Are you familiar with the various radio stations that are operating in and about the City of Allentown? A. I am.

Q. Are the services of Radio Station WHOL needed in this community? A. I feel they are.

Q. Will you explain why? A. Well, in the light of
1366 the public service programs presented through WHOL since its inception here, I know that they have given very freely of their time and of their facilities, and I feel if these facilities were eliminated the community, as such, would suffer a definite loss. I think that WHOL, because of its generosity insofar as its time and facilities are concerned, have filled a very definite public need, in a day and age when we need to have an informed public.

Q. Mayor, are you familiar with the fact that Radio Station WHOL is the CBS outlet in this area? A. I am familiar with that fact.

Q. Do you feel that we need CBS in Allentown and the vicinity through WHOL? A. Well, in the light of the type of programs that come over CBS channels, I would say very much so. That is, if we did not have ready access here locally to the type of programming done by CBS I think something very valuable would be taken away from us.

* * * * * * * * * * *

1367 Q. Do you listen to any of the other stations in this area, in the Allentown area? A. Oh, yes, I do.

Q. Would you say they carry any programs of a public service nature? A. Very much so.

Q. Would you say that those programs also meet the needs of the Allentown community? A. I would say so.

Q. In conjunction with the Old Home Week to which references has been made, did you broadcast any address during that week in connection with those functions? A. I did.

Q. Was that carried over any stations besides
1368 WHOL? A. Yes, I know that I was also on WSAN in an interview.

Q. You also broadcast a talk over WAEB during that week, did you not? A. I believe I did. I tried to cover all of them, in fact.

. . . . . .

1371 **Louis M. Youngerman.**

called as a witness on behalf of Allentown Broadcasting Corporation, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Helwig:

Q. Rabbi Youngerman, will you give your full name? A. Louis Meyer Youngerman.

Q. Where do you reside? A. 3003 Turner Street, Allentown.

Q. Are you a Rabbi of the Jewish congregation in Allentown? A. I am Rabbi of Congregation Keneseth Israel.

Q. Are you familiar with Radio Station WHOL and its facilities? A. Yes, sir.

Q. Are you presently broadcasting over Radio Station WHOL? A. Yes; for the past year I have had a program on Monday evenings at 10:30 known as the "Jewish Hour," a half-hour program.

Q. Will you describe a little more in detail the
1372 type of program? A. Yes. It is a combination of musical and prayer service with a brief sermonette ranging from eight to twelve minutes. The music is recorded on discs provided by our particular Conference, consisting of choir and instrumental music. It consists of a number of prayers, and the sermonette and music.

Q. Are the facilities of WHOL afforded to you without charge? A. Without charge.

Q. Are you in a position to tell us how your programs are received, from the mail response? A. Yes. According to the response which I have received, I personally am very pleased at the number of requests for copies of either the prayers or the sermons and general information concerning my particular religious faith. Apparently the program is listened to by quite a large number of people other than

members of the Jewish faith in the area, judging from the nature of the response.

Q. Do you conduct services on any of the other stations in Allentown or its vicinity? A. No, sir.

Q. Are there any other Jewish radio programs in Allentown or vicinity? A. To the best of my knowledge, at the present moment there are none.

Q. Were the facilities of any of the other local
1373 stations offered to you to broadcast your programs?

A. No, sir. I have been in the community about fourteen months and very shortly after I came here WHOL approached me and offered me the facilities of their station for the program, but no other station has offered our congregation their facilities.

* * * * * * * * * *

Q. Have Jewish programs been carried over any of the other stations? A. Well, about three months after I began my program WSAN had a Jewish program for I think fifteen minutes, possibly a half hour, on a Friday afternoon at 1:15 or 1:30, but that is not now in existence.

Q. Do you know Rabbi Greenberg? A. Yes, very well.

Q. Do you know whether or not he has used the
1374 facilities of other stations? A. He used the one on WSAN for that short period of time.

Q. Have you ever requested the facilities of any other stations? A. No, I have had no occasion to, in view of the fact that we had this program.

Q. Are you familiar with the program known as "The Message of Israel?" A. Yes, sir.

Q. Over what station is that carried? A. I believe it is a Mutual outlet. I think it is WAEB.

Q. Is that of interest to members of your faith? A. Yes.

* * * * * * * * * *

1431 **Reuben D. Bollmann**

was called as a witness on behalf of Allentown Broadcasting Corporation, being first duly sworn, testified as follows:

Direct Examination

By Mr. Helwig:

Q. What is your full name, Reverend? A. Reuben D. Bollmann.

Q. Where do you reside? A. 913 North 22d Street.

Q. Are you a minister of the Gospel? A. Yes, I am.

Q. What denomination? A. Moravian.

Q. Moravian? A. Yes.

Q. Do you have a church in this area? A. My
1432 church is located at 21st and Livingston Streets, the Calvary Moravian.

Q. The Calvary Moravian Church? A. Yes.

Q. Are you connected with the Ministers League of Allentown and vicinity? A. I am a member of it.

Q. Have you been a member since you have been in Allentown? A. That is right.

Q. Do you hold an official position with this organization? A. I am serving now as chairman of the Radio Committee.

Q. As chairman of the Radio Committee, has the program director of Radio Station WHOL in this city made time available to you for religious broadcast? A. Yes. We have a Morning Devotions program from 7:05 to 7:15, and on Sundays there is an hour made available from 11:00 to 12:00 for the broadcasting of church services.

* * * * * * * * * *

1434 Q. Are the facilities of any other radio station in Allentown or its vicinity used by the Ministers League at the present time? A. No, our only associations are with Station WHOL.

Q. In other words, Radio Station WHOL handles these religious programs exclusively? A. For the League, yes.

Q. Has the League, during your period of service, been offered radio facilities by other stations? A. No.

Q. It has not? A. No.

* * * * * * * * * *

1437 **Reverend Charles L. Miller**

was called as a witness on behalf of Allentown Broadcasting Corporation and, being first duly affirmed, was examined and testified as follows:

Direct Examination

By Mr. Helwig:

Q. Will you state your name please? A. Charles L. Miller.

Q. Where do you reside, sir? A. 529 North 8th Street, in Allentown.

Q. What congregation are you connected with in the City of Allentown? A. The Bethel Mennonite Brethren in Christ.

1438 Q. And where is your church situated? A. 530 North 8th Street in the city.

Q. How long have you been connected with this congregation? A. About two and a half years.

Q. Are you familiar with Radio Station WHOL in Allentown, Pennsylvania? A. Quite, yes.

Q. Have their facilities been extended to your congregation for religious broadcasts since September 1, 1948? A. Very generously.

* * * * * * * * * * *

1470 **Wilbur William Hollman**

was called as a witness on behalf of Allentown Broadcasting Corporation and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Helwig:

Q. What is your full name, sir, for the record? A. Wilbur William Hollman.

Q. Where do you reside, sir? A. Lehigh Park-
1471 way Road, R.D. 2.

Q. In Allentown, Pennsylvania? A. No, it is in Salisbury Township.

Q. On the outskirts of Allentown? A. Yes.

Q. What is your occupation at the present time? A. Head of the Music Department, Cedar Crest College, and also a director of music at Salem Evangelical and Reform Church, Cedar Crest College.

Q. Is Cedar Crest College located in Allentown, Pennsylvania? A. I believe it is considered to be in Allentown.

Q. Will you describe what type of educational institution it is? A. A four-year Liberal Arts college for women, fully accredited.

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1472 Q. Were the facilities of Radio Station WHOL extended to you as head of the Music Department of Cedar Crest College? A. Yes. I don't know whether extended to me personally.

Q. I mean extended to you on behalf of the college. A. That is right. There was no charge.

Q. No charge? A. No.

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1473 Q. Are you broadcasting any of your musical programs over any other local station at the present time? A. No, not at the present time.

Q. Have the facilities of any local radio stations been offered to you and the Music Department of Cedar Crest College since you have been there? A. I think it is possible for us to use some of the facilities of the other stations, but, as far as I know, WHOL is the only one who has ever extended their services to us and have been very active there actually. As far as I know, they have extended their services continually.

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1476 **Reverend Willis D. Mathias**

was called as a witness on behalf of Allentown Broadcasting Corporation and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Helwig:

Q. What is your full name, sir? A. Willis D. Mathias.

1477 Q. And where do you reside? A. 1546 Chew Street, in Allentown.

Q. You are connected with what religious church in Allentown? A. With the Emanuel Evangelical and Reform Church.

Q. Where is that church situated? A. 16th and Chew Streets.

Q. Allentown, Pennsylvania? A. In Allentown.

Q. Have you been connected with the Ministers League in Allentown and its vicinity? A. Yes, I have been rather closely associated with it during my tenure in the community.

Q. How many years were you connected with the Ministers League, approximately? A. About 22 years.

Q. Were you president of the Ministers League? A. Yes, I served the second year in Allentown and then again last year.

Q. Did you have charge of its radio activity? A. Yes. When they became interested in radio a number of years ago I was made the chairman and continued in that capacity until becoming president of the League.

Q. Are you familiar with Radio Station WHOL and its facilities? A. Yes.

1478 Q. During your tenure as president of the Ministers League last year and since 1948, when WHOL came on the air, were their facilities offered to you? A. Yes. It was the practice of the chairman of our committee, namely myself, to approach the various stations, the new ones as they arrive on the scene, as well as those that were already in existence locally, and ask them concerning time for the organized religion, through the Ministers League, to have time. So of course WHOL was approached, like others had been approached, and they very graciously gave of their time, first the Morning Devotions, and at their suggestion they gave us, Monday through Saturday, six days, for either 10 or 15 minutes at that time each day, and later on that was changed to a 10-minute period. Several times the hour had to be shifted, but after consultation with the committee, everything worked out amicably each time. This was continued, and I understand that such a program is yet in force.

About, I think it was in February of 1949, it may have been sooner,—I could check—they were anxious to serve I presume in a wider field, and therefore they thought in terms of broadcasting Sunday morning services. At that time arrangements were made for the Ministers League to broadcast such services, rotating through various congregations. The League at that time, in order to give a complete story, was broadcasting over another sta-
1479 tion on Sunday morning, but that was on a two-weeks scale.

Q. Will you state that station? A. WKAP. Then WHOL continued with its facilities on Monday morning, even though it had been discontinued since my tenure as chairman of the committee, as far is WKAP is concerned for Sunday mornings, but it is continuing even now with WHOL, because my own congregation was on not many weeks ago and did the first series of four Sundays.

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1483 Q. Do you recall ever arranging for any program to be carried over WSAN and WAEB? A. Oh, yes. As I mentioned earlier in my testimony, it was my function as chairman of that committee to approach the various stations. WSAN was the first station locally, therefore my first contact was with the manager of that station, the Reverend Bryan Musselman. They gave us time. Later on those periods were cut to fewer days. However, they did give us other time, in fact all stations have given us time for various specific programs. But we did have at first a five-day-a-week schedule with WSAN, and then they found it necessary to cut that to fewer days. WAEB—I believe you asked about all the stations—

Q. Yes. A. WAEB carried such a program during my tenure as chairman of the committee five days a week, a devotional program, along with WHOL. However, I sup-
pose—I am here to tell the truth—when their baseball
1484 contract came into existence they, like WSAN, because of certain commercial commitments, had to cut off some of the station-sponsored programs, which left us out on those devotional periods with that particular

station in the afternoon. However, they did continue—WAEB, that is, did continue a program on Saturday night, which happens to be my baby right now, I had started it, and I was seeking to get other folks' help, but I believe the station says I ought to continue with it, so that is the situation there.

WFMZ gave us time for vespers, and I understand in recent months that has been discontinued because of a change in setup. And WKAP for a time had extra programs in addition to the Sunday morning program, but due to certain difficulties, I understand they gave up their Sunday morning schedule. However, WHOL still has the Sunday morning schedule for the churches. Did I answer your question?

Q. I believe so. When this quantity of broadcasts was reduced, was that due to mutual agreement? A. Well, really you put me on the spot. I do not want to say anything, because my relationships with all of the radio stations have always been, I think, rather good, even though sometimes we saw things a bit differently, yet we were usually able to work them out fairly well. Right now, for example, at one of the stations a religious news broadcast was cut off, but I am told it was through error and we are
1485 waiting until the word is given that it was in error and that religious news broadcasting, for which there seems to be some clamoring, is to again be put on that certain station. So when you ask the question about the reduction of programs I can only speak in general terms, unless you request that I be very specific.

Q. Was there any complaint by any of the stations as to the ministers not appearing from the broadcasts? A. Yes, that was on the part of WSAN, and may I give the plan which was in operation with our committee for all of the stations. There were enough people on the committee so that an individual was responsible for a given week. He, in turn, secured the people for that week, when the complete schedule was set up, and then it was his responsibility to check. For instance, if Mr. A was to have the first

week in January with Station WSAN, it was his responsibility, according to the operation of the committee, to contact the men who were to appear at that station during that week, to be reassured that they had not forgotten. Now in some cases individuals, probably through human error, or perhaps just because of a lackadaisical spirit, did not possibly follow through and therefore there were a few complications. Unfortunately I might say that all of those complications, at least for the most part, happened with WSAN, and I believe the WSAN representatives here today will bear me out in that. We talked about
1486 it. While I was still helping with the committee, while we were trying to see what to do, I recall one time, the very next week the man on the committee who ought to have known better slipped up, and I was in the dog house as chairman of the committee, until I could explain the setup, and they agreed that our setup seemed to be foolproof. Once in a while foolproof setups do not function.

Q. Do you recall whether or not WSAN carried these programs, or continued to carry the programs after Reverend Bollmann became chairman of the committee? A. Yes, for a short time.

Q. Are you familiar with the Heidelberg College Choir? A. Oh, yes.

Q. Is that connected with your denomination? A. Yes.

Q. Is that carried by any of the local stations? A. Yes, the Heidelberg College Choir was in Allentown on the 2d of February. WHOL carried one hour of their concert that night. They made inquiry if it would be possible to carry it, and I felt that it would be well for a larger area of the community to hear that choir, because they have a reputation, so as chairman of the committee sponsoring their appearance I contacted the other members of the committee and they agreed that it should be done. So WHOL
1487 carried one hour of that program. Then inasmuch as I then had a close association with WAEB

through the Saturday night broadcasts, which it happens to be my privilege or duty to perform at the present time, I asked them if they would be interested in carrying such a program, and they immediately came back saying they would be happy to do it. So the Heidelberg College Choir gave a 15-minute broadcast over that station also on that date, in the afternoon from 4:45 to 5:00 o'clock.

Q. Have any of the stations actually refused you time to broadcast? A. May I first give an affirmative answer concerning your question. One year ago the local churches operated what was called a Christian Teaching Mission. At that time, as chairman of that effort, I approached all of the stations, the five stations, to give spot announcements concerning a Sunday afternoon religious survey which would be made. They all heartily gave us cooperation. Then we asked them to make spot announcements concerning the availability of the cards, the census cards for all the clergy, and again all of the stations, including the one that is in litigation here today, WHOL, gave hearty consent to help, and at various times it has been my responsibility to approach stations for help on Brotherhood Week, or one thing or another, and they have always cooperated. For example, just a few weeks ago some
1488 of the stations carried programs concerning Brotherhood Week, in which I participated. May I say also in various ways the stations, I think, have always been interested. However, I can say this, that none of them have been any more cooperative than the station which is being questioned in the proceeding today. I say that since they are the ones on the spot, apparently.

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Q. Since we are dealing with specific stations I feel that I have to ask you which station cut off your religious news program? A. Well, it so happens that it was WSAN, with which station I had a very close relationship, with that program, over I think eight or 10 years. It was started

because of a general desire on the part of people for a religious news broadcast. I knew that such a broadcast was being given over some of the national networks by the Reverend Walter Van Kirk. I was then asked by a person representing the Federal Council Department on Evangelism, which is the former Federal Council of
1489 Churches and now a part of the National Council of The Churches of Christ of the United States of America, if a station in Allentown might be interested in doing such a thing, and I went to see WSAN and they agreed, and we went along, and they gave me a very fine spot, 6:30 on Saturday night. Then, when they got a chance to sell that, which is a very good hour, they changed the program to another time, and it was shifted around for a while, and then, I think through error, because the Ministers League was cut off—and I haven't discussed this with the manager of that station, although I expect to do it one of these days, because I have been approached to take it to another station, but since I was with them I am going to give them first chance, and if they say "No", all right, my conscience is free. So it continued with them until the time when the Ministers League was cut off some months ago, and that was cut off with it. I did not know it until the day of the broadcast.

It so happened that the local Lehigh County Tuberculosis and Health Society had requested that I go to WSAN to make a recording which would be used on the Sunday afternoon broadcast. So when the program director called me to arrange for that recording I said, "All right, I will do it right after my broadcast at one o'clock," which ran from 12:45 until 1:00, the religious news, which had been shifted to that hour. "Oh," he said, "you are not
1490 broadcasting." I said, "Is that so?" "Why yes. Don't you know about it?" I said, "No." Well, it so happens that it had been discontinued and I did not know it, so I went in and we made the recording, and then at that time it was felt we ought to discover whether or

not this was a mistake that it had been cut off together with certain other programs, since it was something distinct and different from the other programs.

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1493 **J. L. Stackhouse**

called as a witness on behalf of Easton Publishing Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lovett:

Q. Please give your name, address and occupation. A. J. L. Stackhouse. 529 Mixsell Street, Easton, Pa. I am president, treasurer and general manager of the Easton Publishing Company.

Q. What is the business of the Easton Publishing Company? A. It is the publisher of the Easton Daily Express and owns and operates FM Radio Station WEEX in Easton.

Q. How long have you been associated with the Easton Publishing Company? A. Thirty-three years.

Q. What are your duties in connection with that
1494 company? A. Supervision of the business.

Q. What is the Easton Express? Will you explain briefly? A. It is a daily newspaper which was established as a daily in 1855. It circulates in an area of approximately a 25-mile radius to the north, east and south of Easton, and in a radius of about six miles to the west, in the direction of Allentown and Bethlehem.

Q. Approximately what is the present circulation? A. The present circulation is approximately 44,400.

Q. What was the circulation when you first joined the Express? A. A little less than 3000.

Q. What, if any, other newspapers are published or circulated in the Easton area? A. Well, the Allentown and Bethlehem dailies, the Newark News, that is Newark, New

Jersey, the Plainfield, New Jersey, Courier, and there is a daily at Bangor, Pennsylvania, and the Philadelphia and New York newspapers, dailies. In addition there are several weekly newspapers published and circulated in the area. These include the Phillipsburger at Phillipsburg, New Jersey, the Star at Washington, New Jersey, the Hunterdon Democrat and Hunterdon Republican at Flemington, New Jersey, and then there are weeklies in the Pennsylvania area published at Nazareth, Windgap and Pen Argyle, I believe, and also at Portland, Pennsylvania.

1495 Q. Have you concluded? A. Yes.

Q. During the hearing in Allentown some question was asked regarding the circulation of the Bethlehem paper. Do you happen to know the circulation of both the Bethlehem papers and Allentown papers? A. All of the newspapers in the valley are members of an association known as the Audit Bureau of Circulations. The Audit Bureau of Circulations is composed of members of daily newspapers totaling 1193 and certain—

Mr. Rollo: I concede the accuracy of the ABC figures, if that will save any time.

The Presiding Officer: Very well.

The Witness: That is all right. Excuse me. The reports of the Audit Bureau of Circulations for the twelve months' period ending September 30, 1950, show the following average paid circulations for that period: The Easton Express, 43,489, which is an evening publication. The Bethlehem Globe-Times, 23,779, an evening publication.

Mr. Rollo: What was that figure again?

The Witness: 23,779. The Evening Chronicle of Allentown, 20,257, an evening publication, and The Morning Call, 58,250, a morning publication.

By Mr. Lovett:

Q. That is in Allentown, The Morning Call? A.

1496 Allentown, yes, sir, and the Chronicle, also Allentown, if I did not state it.

Q. Have any other daily newspapers been published in Easton since the formation of the Easton Publishing Company? A. Yes.

Q. Will you name them and tell what happened to them? A. The afternoon Easton Free Press was published for a number of years and was merged with the Easton Express in 1926. About 1940 a daily, which became known as The Morning Free Press was established in Easton and was voluntarily suspended in 1945. It was a newspaper which was printed in Bethlehem and circulated in Easton.

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1503 By Mr. Lovett:

Q. I note that among the fixed assets, fixed depreciated assets, there is an item of $104,898.32 representing the radio plant of Station WEEX. Does this include the studios and radio tower and the entire antenna system, as well as the transmitting plant? A. Yes.

Q. You state that this is a depreciated figure. Can you tell us what rate of depreciation was used? A. We have used the rates of depreciation which have been approved by the Treasury Department for arriving at depreciation for radio stations. In other words, the basis is the Treasury Department's own approved rates for radio stations.

Q. What are those rates? A. On the tower it is 6 per cent. The air conditioning and soundproofing equipment 10 per cent, and on the antenna, the transmission lines, transmitter and transmitting equipment, studio controls, and furniture and fixtures it is 15 per cent. On buildings it is 5 per cent.

Q. Now what was the total depreciation on that rate basis that you have taken for the period preceding the date of the balance sheet, November 30, 1950? A. In

1504 exact figures it is $30,624.44.

Q. So that this, added to the $104,898.32 shown on the balance sheet, represents the total cost of the WEEX installation, is that correct? A That is correct.

Q. Do you have that total figure? A. $135,522.76.

. . . . . .

1536 Q. Let us go into the question of circulation of newspapers. Do you have your ABC figures before you? A. Yes, sir.

Q. With respect to the circulation of the Easton Publishing Company, which is 44,400, I believe you said— A. That is the present figure. The average for the 12 months ending September, 1950, was 43,489.

Q. Is that broken down in the report you have before you as to cities or counties? A. It is.

Q. What is the circulation in the City of Easton? A. The circulation in the city area which is adopted by

1537 the Audit Bureau is 23,931.

Q. Could you state for the record what that area embraces, other than the City of Easton itself? A. Phillipsburg, New Jersey, Wilson Boro, the boroughs of Glendon, Stockertown, Tatamy, West Easton, the townships of Forks, Palmer, Williams, and in Bucks County Regalsville, and in Warren County Alpha Boro, the townships of Lopateong and Pohatcong.

Q. Do you know or does the report show what circulation you have in Allentown? A. It does not.

Q. Do you know of your own knowledge approximately what your circulation is over there? A. It is under twenty-five.

Q. How about Bethlehem? A. That is also under twenty-five.

Q. Now the other daily papers that you referred to, I believe the Newark News was one of them, was it not? A. That is correct.

Q. Where is Newark? A. Newark is approximately 60 miles to the northeast.

Q. Is that Newark, New Jersey? A. Yes.

Q. Just across the river from New York? A. That is right.

1538 Q. I see. Do the ABC figures show the circulation in the Easton city zone? A. Of the Newark News?

Q. Of the Newark News. A. No, I do not have those figures.

Q. One of the papers you mentioned was the Plainfield Courier. A. That is correct.

Q. What town was that from? A. Plainfield, New Jersey.

Q. Where is that? A. That would be about 30 to 40 miles southeast of Easton.

Q. And about the same distance from New York? A. Probably 50 miles from New York.

Q. Do you have the circulation figures of that newspaper in Easton? A. I do not.

Q. Do you have any knowledge as to the number, of your own personal knowledge? A. I do not.

Q. Does that also apply to the Newark News? A. Yes.

Q. Now the next one you mentioned I think was
1539 Bangor, Pennsylvania. A. That is correct.

Q. Where is Bangor? A. Bangor is about 20 miles approximately north of Easton, or 18 miles north of Easton.

Q. Do you have the circulation figures of that newspaper? A. They are not available.

Q. They are not a member of the ABC Audit Bureau? A. That is correct.

Q. Do you know approximately what the circulation is in Easton of that newspaper? A. I have no knowledge, but I presume it is nil in Easton.

Q. Do you know what the total circulation of the Newark News or Plainfield Courier is? A. I do not.

Q. Do your ABC reports show the circulation of the Philadelphia or New York newspapers in Easton? A. Not these that I have.

Q. Do you have reports available on that? A. I doubt it.

Q. Would you mind looking at your records and bringing them back to the hearing after the noon recess, if you do have them? A. Yes.

Q. Do you know of your own knowledge what the
1540 circulation figures are on the Philadelphia or New York newspapers? A. I do not.

Q. There is no other daily newspaper in Easton, is there? A. That is correct.

Q. And I take it that Bangor, Pennsylvania is the closest to Easton? A. Yes.

Q. Other than the Allentown newspapers? A. That is right, Allentown and Bethlehem newspapers.

Q. Do you have the figures on the Allentown or Bethlehem newspapers? A. I do.

Q. The circulation figures here in Easton? A. Yes.

Q. Would you state them, please? Now this is for the city zone. A. Yes.

Q. That is my question. A. I will qualify that, that I would not know the figures for the Easton city zone. I know only the figures which they show as their circulation for Easton. I do not know what is included in that.

Q. All right, will you give that? A. Fifty-nine for the Bethlehem Globe-Times. The Morning Call, 453. The Evening Chronicle, one.

1541 Q. The 453 for the Morning Call includes those delivered by carriers and dealers and mail, is that correct? A. That is correct.

Q. That was the morning paper, was it not, 453? A. That is right.

Q. And the evening paper was one? A. One

Q. Do you get that one? A. Probably do.

Q. Do you have any circulation figures on the weekly newspapers you mentioned? A. No, sir.

Q. They are all small papers, are they not? A. No, they are not all small. The Hunterton newspaper is approximately 7,000 circulation, the Washington, New Jersey Star is not a member of the ABC but I believe its sworn statement is in the neighborhood of 5,000. The other weeklies' sworn statements are approximately in the neighborhood of 2,000.

Q. The rest that you mentioned? A. That is right.

Mr. Lovett: Two thousand each?

The Witness: Yes, each.

By Mr. Rollo:

Q. And those are total figures for the weeklies,
1542 not their circulation in Easton? A. No, that is the total, not in Easton.

Q. Now Phillipsburg is one you mentioned. That is just across the river from Easton, I understand, is that right? A. That is right.

Q. What was that Washington Star? What town is that? A. Washington, New Jersey.

Q. Where is that? A. About 12 miles east of Phillipsburg.

Q. And Hunterton? A. That would be in Flemington, New Jersey, about 22 miles southeast of Easton.

Q. Were there two weeklies there or just one? A. Two.

Q. One called the Democrat and the other called the Republican? A. That is correct.

Q. Where is Nazareth? A. Nazareth is about eight miles west, a little nort..west of Easton.

Q. And where is Windgap? A. Windgap is about 11 miles north of Easton.

Q. And where is Pen Argyl? A. They are all practically in the same community, about the same distance north of Easton, 11 miles.

1543 Q. And Portland, Pennsylvania? A. Portland, Pennsylvania is again north about 24 miles.

Q. Do you have available the populations of these towns that we have just enumerated, that have weeklies? A. I do not.

Q. Was it your testimony on direct examination by Mr. Lovett that these weeklies had any circulation in Easton? A. It was not intended so; in the Easton area.

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1557 Q. Would you mind showing me what you have? A. Yes. (Handing clippings to Mr. Rollo.)

Q. I hand you what purports to be a clipping dated May 3, 1943, from your newspaper mentioning WEST. Would you be good enough to read that, please? A. The heading?

1558 Q. No, the article. A. The heading is, "WEST to Experiment with UHF Television."

"Radio Station WEST, Easton, plans to experiment for about sixty days with television beyond the present authorized ranges. Elwood C. Anderson, general manager of WEST, said signals will be transmitted in the UHF (ultra high frequency) range, but emphasizes that the public will not be able to view any of the signals sent out by the experimental transmitter since all present receivers are designed to receive only in the VHF (very high frequency) range."

Q. Continue, please. A. "Present authorized television stations and receivers in use operate only in the VHF range and only one channel in this range, channel 8, has been allocated to the Lehigh Valley area. The Easton Express is an applicant for permission to provide a public service through channel 8. Other applicants are Philco Corporation, Lehigh Valley Broadcasting Company, and Penn-Allen Broadcasting Company. All applications for regular television service are frozen by the Federal Communications Commission pending further technical studies."

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1570 Q. Did the Easton Publishing Company earn a profit last year? A. Yes, sir.

Q. Approximately how large was it?

Mr. Lovett: I object, Madam Examiner, as being entirely immaterial.

Mr. Schildhause: I will withdraw it.

The Presiding Officer: Very well.

By Mr. Schildhause:

Q. Did the corporation declare dividends last year? A. Yes.

Q. What was the size of the dividend?

Mr. Lovett: I object, Madam Examiner, as being entirely immaterial.

Mr. Schildhause: It is possible to draw an inference from this record, Madam Examiner, that the beneficiaries of some of the trust held stock in the Easton Publishing Company, may, at a later date, sell off their holdings in the Easton Publishing Company. That being so, I think it is certainly pertinent, and probably material. The
1571 question of dividends is certainly pertinent and probably material to the question of whether they will sell off their holdings.

The Presiding Officer: Objection overruled. The witness may answer.

The Witness: Are you speaking of 1950? You said last year, I believe?

By Mr. Schildhause:

Q. Does the corporation keep its books on a calendar year basis? A. That is correct.

Q. For the year 1950 what were the dividends? A. I do not have the figures here.

Q. What was the size of the dividends per share? A. I don't know that without checking the record.

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Q. You did testify, did you not, that the New York papers, the Newark papers or paper, the Allentown newspaper or papers and the Bethlehem newspaper, among others, all have circulation in Easton? A.
1572 No, in the area.

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1586 The Presiding Officer: Mr. Stackhouse, as a newspaperman, do you consider the amounts being collected in a community, from whatever source, in connection with a project such as the Polio campaign a newsworthy item?

The Witness: I do.

The Presiding Officer: In answer to a question by Commission counsel I understood you to say that you did not know the amount of dividends that were paid, and my only question to you now is, am I correct in assuming that you do not know what dividends you received from the stock which you own in the Easton Publishing Company, last year?

The Witness: No; I do know that, I mean my records show it, but I do not know it as of this moment.

The Presiding Officer: Do you consider the program logs of a radio station in a community of interest to the public?

The Witness: Yes, ma'am.

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1632 **Nelson S. Rounsley,**

called as witness on behalf of Easton Publishing Company, being first duly sworn, testified as follows:

Direct Examination

By Mr. Lovett:

Q. Will you please state your name, address, and occupation? A. Nelson S. Rounsley, Easton, general manager, Radio Station WEEX.

Q. What was the nature of your work before you became manager of WEEX? A. I was national advertising manager of the Easton Express for about 12 years, and before that held executive positions on papers in Lancaster, Altoona, and Harrisburg.

Q. Will you state whether or not you have been a resident of Easton during the time you were with the Express? A. I have been, in fact, I own my own home here.

Q. Have you been or are you now identified with any community activities in this area? A. Well, I am a member of the College Hill Presbyterian Church, the Ameri-

1633 can Legion, the Easton area Chamber of Commerce, Pomfret Club, various Masonic organizations, various Chamber of Commerce committees, the General Alumni

Committee of the Bucknell University. I have been active in the Community Chest and civic projects, and I am presently division manager of the Bucknell University fund-raising drives.

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1683 Q. I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network programs on your proposed AM schedule. A. That is correct.

Q. That is your present plan, is it? A. That is the present plan.

Q. You no longer desire to affiliate with Mutual? A. There has been no conversation with Mutual in the past five years.

Q. You recall you originally testified you planned to affiliate with Mutual, do you not? A. I said we expected to discuss it with Mutual, but no arrangements have been made.

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1694 Q. Has this Citizens' Advisory Committee that you show on your first page of Exhibit 17 in the original hearing ever functioned? A. Not as a committee. We have had a dinner meeting, but the plan that we had originally proved to be rather unworkable and the members of the committee asked that they function as advisors rather than as a committee.

Q. So you are not proposing a committee of this kind? A. We are not. It was discontinued because it was obviously silly to get 7 or 8 busy people together when you only wanted to talk to one of them, to get advice on one field of activity.

Q. Were you in the hearing room last Friday
1695 afternoon when Mr. Mason testified? A. I was.

Q. He is the president of the Easton Players Guild, is that correct? A. That is correct.

Q. By whom is he employed? A. Easton Publishing Company.

Q. In what capacity? A. Reporter.

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1710 By Mr. Schildhause:

Q. Mr. Rounsley, you stated, did you not, that you
1711 had no current plans to affiliate your proposed AM station with the network? A. That is correct.

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Q. My recollection is that you said your original plans were to have a listeners council, I forget how you termed it. A. A citizens advisory council, I think is the term I used.

Q. The Citizens Advisory Council. I think you said those plans had never been completed, or at least you had not formed that Citizens Advisory Council. A. No, that was not precisely what I said. We had approached those people and they had agreed to serve prior to the original
1712 hearing. However, when we got into the actual operation we found the plan was not feasible, since it would require the whole committee to be present and one person would be called on because of his knowledge of veterans affairs, or whatever the case may be, so at the request of the committee itself they do function as individual consultants rather than as a committee.

Q. You are using those people now, I take it? A. That is right, those people or their successors. Some have moved away and some of them were replaced by other people.

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1715 A. There would be no time sold for religious programs.

Q. You say that will be a firm policy? A. That will be a firm policy. I better qualify that. In the event of any network affiliation, any programs accepted by the network as commercial, any religious programs, may or may not

be accepted by the station as commercial. That is in the future, and we made no policy about it.

Mr. Rollo: Did not you answer a question of mine to the effect that you did not intend to affiliate with the network?

The Witness: I did not say we did not intend to, I said we made no overtures at all. That is in the remote possibility that some time in the indefinite future we might affiliate.

1716 By Mr. Schildhause:

Q. I presume you or Mr. Stackhouse have discussed, and the Board of Directors, too, I might add, of the Easton Publishing Company have discussed the question of network affiliation. Are you predisposed to accept one if offered? A. If offered a desirable affiliation, we would certainly consider it.

* * * * * * * * * *

1720 The Presiding Officer: Mr. Rounsley, I am a little confused about this network proposition. I wish you would tell me what your plans are with respect to network. Now let us not talk about the dim distant future, let us talk about something not quite so far away.

The Witness: If we have an AM facility we would probably explore the possibility of a network affiliation. We would naturally have to see what was available, what the terms are, something we do not know now, but we would explore that possibility.

The Presiding Officer: Am I to understand you would not wait for somebody to come to you?

The Witness: That is correct. In other words, we would have to have something to affiliate before we talk business.

The Presiding Officer: It is still not clear in my mind. Do you plan to sit by and wait for somebody to approach you, or what would be your procedure?

The Witness: I think we would probably see what was available, and after we saw what was available, if there was

a network that we thought was desirable and available, we would probably call them.

The Presiding Officer: On direct examination I think you referred to the rewriting of certain news, and
1721 you said "our organization". Would you explain to me what you mean by "our organization"?

The Witness: By "our organization" I am referring to the radio now, and that includes the news editors at the station, and more particularly the two men we maintain in the Easton Express office in the late afternoon and evening, both of whom are on the WEEX payroll.

The Presiding Officer: Full time?

The Witness: Full time, yes.

The Presiding Officer: My next area of confusion is how are these two organizations operated now? Are they operated as distinct businesses, or are they operated as two facets of one business? I am talking about the newspaper and the radio station.

The Witness: In the day-to-day operation they operate as two businesses. However, the payroll department of the Easton Express handles our payroll, the billing department handles our billing. It is only in the day-to-day operation that they are distinct. The accounting and everything like that is handled by the Easton Publishing Company, of course, or the Easton Express, I should say.

* * * * * * * * * *

1756 **Edward C. Anderson.**

called as a witness on behalf of Allentown Broadcasting Corporation, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rollo:

Q. Will you state your name? A. Edward C. Anderson.

Q. Where do you reside? A. 230 Taylor Avenue, Easton, Pennsylvania.

Q. Are you appearing in this proceeding by subpoena? A. I am.

Q. What is your business? A. Manager of Radio Station WEST.

Q. Where is WEST located? A. 516 Northampton Street, Easton, Pennsylvania.

* * * * * * * * * * *

1763 (Allentown Broadcasting Corporation Exhibit No. 90 was received in evidence.)

By Mr. Rollo:

Q. Is the week of January 14, 1951, typical of the program service being rendered by WEST? A. I would say it is.

Mr. Rollo: I ask that this be marked Exhibit No. 91 for identification.

(The document referred to was marked Allentown Broadcasting Corporation Exhibit No. 91 for identification.)

By Mr. Rollo:

Q. I now ask you to refer, Mr. Anderson, to Exhibit No. 91, and ask you to state what that is. A. That is programs in the public interest for the year 1950 that were broadcast over Radio Station WEST.

Q. That is for the entire year? A. That is right.

Q. Would you please go through the exhibit and make any comments you feel may be required to explain the programs that you have listed there? A. Do you want me to go through the entire schedule?

Q. If you would, please. A. The American Cancer Society program is a 15-minute program, put on by the Cancer Society. It is a transcribed program.

* * * * * * * * * * *

1809 Q. May I ask you, Mr. Anderson, whether or not you have seen any adverse editorial comment concerning the policies of the Easton Express in any other newspapers? A. In the Phillipsburger.

Q. Is that a weekly newspaper published across the river from here? A. It is.

Q. I show you an edition of The Phillipsburger—

Mr. Lovett: Madam Examiner: I do not see what this has to do with the case, the comments by some other newspaper regarding the policy of the Easton Publishing Company.

Mr. Rollo: If the Examiner please, I am endeavoring to show on this record a pattern which the Easton Express, I believe, has been following of protecting its monopolistic position in this community. It is a small community, and I recognize it is a very difficult task that I have undertaken.

People in a small community that has only one
1810 newspaper are not only reluctant but they refuse to appear and testify against a newspaper, because, win or lose, the newspaper is still going to be in business. Under those circumstances I felt this was one acceptable way of proving the point that I am trying to establish, at least to that limited purpose, the fact that there has been adverse editorial comment concerning its policies, and I had intended to ask the witness to the read the editorial.

The Presiding Officer: Objection overruled. The witness may continue.

By Mr. Rollo:

Q. Will you read the editorial, please? I don't believe I stated the date. I was interrupted by the objection. It is dated Thursday, May 19, 1949, is that correct? A. That is correct.

"NEW KIND OF JOURNALISM

"Many Phillipsburg folks who like to think first and well of their community have been reading and studying what seems to be a new kind of journalism coming from across the river, which bears all the earmarks of being founded on the theory of monopoly and arrogance rather than neighborliness, service and freedom of the press.

"Editorial and news columns have repeatedly been devoted to what many interpret to be veiled reflections against

the Phillipsburg public school system and adminis-
1811 tration executives, slighting treatment of the efforts of civic leaders, etc. The elected municipal officials have not escaped being made victims of the same kind of propaganda and by omission of facts or by dodging the issues to create headlines of a type which might injure citizen morality and faith in Phillipsburg as a community and its government. More obviously with a view of promoting a monopoly in the local newspaper field.

"Some of the methods being used by members of the reportorial staff assigned to cover the Phillipsburg area are amazing. During the week the top ranking officers of the Phillipsburg police force requested that no publicity be given to an all out effort by the police with the aid of citizens who were alerted to find clues to lead to the arrest of a dangerous night prowler operating in the First and Third Wards.

"An Easton reporter who said he was working under the policy of the newspaper employing him, refused to consider any "off the record" requests, even when the police explained that publicity would drive the criminal underground. When access to police records was refused, Chief of Police Stabp said, the reporter told him that his newspaper would print what it knows about the prowler and add that the Phillipsburg police know nothing about it.

"Scores of individual news sources in Phillipsburg have been told by the Easton news staff members in these words:

'If you do not give us your news stories first we will
1812 not print them at all.' Others have been confronted with the question—'why did you give your news to the Phillipsburger before you gave it to us?' That cannot be interpreted anything other than an insult to defy Phillipsburg citizens to support their own enterprises whether it be a newspaper or other business. We do not know how far Phillipsburg would get in Easton with that policy, but we do know that we would not stoop to try it.

"All this is obviously an idea of building a greater monopoly, but is it a sure way? Certainly, it will sooner

or later be resented because it is not in the interests of service, law and order and constitutes a new interpretation of freedom of the press to ignore or violate release dates, whether coming from the President of the United States or the Chief of Police of Phillipsburg. In the case of the latter, the violation is more serious because Justice is involved.

"We make this critical commentary without a single thought based on competition or business jealousy. Having been engaged in the local newspaper field over a long period of years, we know much of the attitude of both readers and advertisers to be definitely against 'a one paper city' and more definitely so if the policy of the management is dictatorial and not in accord with those it serves.

"Under such a policy even a monopoly cannot clear the field, and stands about as much chance of doing so in Northwest Jersey as Westbrook Pegler has to exile the Roosevelt family."

1813 Q. Is that the complete editorial? A. That is right.

Mr. Lovett: Madam Examiner, now that the statement has been read, I renew my objection and make a motion to strike on the ground that it is wholly hearsay and is the opinion of persons not presently available for cross-examination.

The Presiding Officer: Mr. Lovett, as I understood the offer, it was not to prove the truth of the statements made but it was offered to show that adverse editorials had been written, and for that reason your motion to strike is denied.

Mr. Lovett: I understand then that the only reason this is put in is to show that another newspaper has made adverse comments towards the Easton Express?

Mr. Rollo: In offering the exhibit or the editorial I stated it was to prove the fact that adverse editorial comments had been printed.

. . . . . .

1789 Received July 31, 1950

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

Docket No. 9132
File No. BP-6552

In re Application of

WKAP, Inc., (WKAP)
Allentown, Pennsylvania

Petition for Hearing, Rehearing, or Reconsideration

Allentown Broadcasting Corporation (Station WHOL), by its attorneys, petitions the Commission for a hearing, rehearing, or reconsideration of the "Initial Decision" and the Order of July 10, 1950, released July 11, 1950, FCC 50D-34, proposing a grant of the above described application of WKAP, Inc. (referred to herein as "WKAP") for change in frequency and for increase in hours of operation from daytime only to unlimited time, and in support thereof, Allentown Broadcasting Corporation (referred to herein as "WHOL") states:

1. WHOL's interest in the above entitled proceeding is based upon the provisions of Section 307(b) of the Communications Act of 1934, as amended, as interrelated with the issues set forth in the Commission's Notice of Hearing of February 16, 1950, in the further proceeding upon WHOL's application, entitled *In re Easton Publishing Co.*, Docket Nos. 7179, 7180 and 7441, FCC 50-151 (referred to herein as "WHOL Notice of Further Hearing"). WHOL disclaims any interest in the matter of the application of Lackawanna Valley Broadcasting Co. (WSCR), Docket No. 9133, which was consolidated for hearing with the WKAP application.

2. WHOL is the grantee of an unlimited time radio broadcasting station, for operation on 1230 kc., with power of 250

watts, in Allentown, Pennsylvania, which has been in service continuously since September 8, 1948, under the Commission's decision entered June 14, 1947, following a hearing held May 8-15, 1946. The decision granting WHOL's application following rehearing and appeal was *affirmed* in part and remanded in part. *Easton Publishing Co.* v. *FCC.*, 175 F. 2d 344 (May 4, 1949). The scope and character of such further proceeding ordered or permitted under the judgment entered in the *Easton Publishing Co.* case were raised by writs of mandamus now pending on appeal (No. 9829), as to which oral argument was had on May 30, 1950. Such further proceeding of whatever scope or character pertains to issues based on said Section 307(b). In the event that such further proceeding may permit or require a reopening of the record of WHOL's application, for the submission of evidence as to broadcast facilities and radio service presently available in the Allentown-Easton area, as contemplated by the WHOL Notice of Further Hearing, then in such event the question is presented as to whether in such further proceeding the proposed grant to WKAP of nighttime hours of operation and its additional service is or is not relevant or material to the issues of such further proceeding.

1730

3. Although this petition is limited to the matter of WKAP's application for additional hours of operation, WHOL, however, expressly reserves such rights as it may have as licensee or applicant to bring before the Commission any and all stations, licensees or applicants for modifications or renewals thereof, in the Allentown-Easton area, whose interests, assignments or radio services might be drawn in question or relevant to the issues set forth in said WHOL Notice of Further Hearing, and whose presence may be necessary or proper in such further proceeding to a determination of facts and decision under Section 307(b), in particular, the authorizations made by the Commission, since the hearing record of WHOL's application was closed, i.e., the grant of WKAP's original application on May 24,

1946, for a third daytime station in Allentown, and the grant of WAEB's application on May 3, 1948, for a fourth station in Allentown.

4. On the assumption that WHOL's original grant is subject to rehearing, as contemplated by the WHOL Notice of Further Hearing, and that the above entitled grant of unlimited hours of operation and nighttime radio service to WKAP is material and relevant to such rehearing, then in such events the unusual circumstances of fact and procedure on interrelated issues between the above entitled proceeding and the WHOL Notice of Further Hearing raise certain novel questions, perhaps of first impression, which require a searching out of the proper construction of Section 307(b), as applied to the rights and equities
1791 of licensees and applicants for radio facilities and radio service in the Allentown-Easton area. Without attempting to review various Commission actions and the large output of pleadings before the Commission in the docket on WHOL's application, it is sufficient here to state that contentions based upon Section 307(b) issues as between Allentown and Easton, have been continuously before the Commission and on appeal since 1946. During this period, while such matter was at issue on the WHOL application, and not finalized, the Commission has made three additional grants of radio facilities to Allentown, i.e., (1) daytime grant to WKAP's predecessors, (2) grant of a third fulltime station in Allentown to WAEB, (3) the proposed grant of unlimited time to WKAP. The hearing accorded WHOL was on the matter of determining whether Allentown or Easton had the greater need for a *second* fulltime station and whether WHOL could better provide that need in the public interest, which matters were determined by the Commission in its grant of WHOL's application. It would be clearly inequitable, if not arbitrary, for the Commission at this time to subordinate WHOL to the junior grants aforesaid, including the proposed grant of unlimited time to WKAP, as to which WHOL has had no

opportunity for hearing and no notice prior to February 20, 1950. In any event, such proposed grant of additional hours of operation and additional radio service to WKAP, for which the Initial Decision finds and concludes there is a public need, in addition to the radio facilities and radio service presently available to Allentown, including that of WHOL, either is or is not relevant to the WHOL Notice of Further Hearing. If not relevant, the Commission in said Initial Decision should clearly so stipulate by appropriate findings of fact and conclusions.* If not so excluded as irrelevant, then WHOL in the event of a further pro-
1792 ceeding on a reopened record, is entitled to an opportunity to be heard on a comparative basis with WKAP as to which facility or service in the public interest will result in better providing a fair, efficient and equitable distribution of radio service in the Allentown-Easton metropolitan area within the intent and purpose of Section 307(b). Although litigation of such issues has been somewhat dormant since repeal of the Davis Amendment and discontinuance of the quota system, there is no less a statutory requirement and no lack of judicial construction. The Supreme Court, in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933), observed that the "equities of existing stations undoubtedly demand consideration". On the subject of procedure in applying the statutory standard of "fair and equitable allocation", the opinion of the Supreme Court, in upholding the right of an applicant from an under-quota State to apply for the assignment of a station in an over-quota State, went on to point out:

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* *In re The Mount Vernon Broadcasting Co.*, Docket No. 8021, FCC 50-733. The Commission, in its Decision released June 2, 1950, in denying a request to reopen a record, held:

"* * * In an adjudicatory proceeding such as this, the Commission is bound by its Rules and Standards and cannot weigh against the Ashland applicant the effect of grants of other applicants which were made during and since the hearing in this proceeding, in accordance with our Rules and Standards regarding the allocation of Class IV stations. We therefore conclude that the record in this proceeding should not be reopened."

" * * * While it required the applicant to state the facilities it desires, there was nothing to prevent respondents from contesting the applicant's demand upon the ground that other facilities were available and should be granted in place of those which the applicant designated. If such a contention had been made, there would have been no difficulty in bringing before the Commission other stations whose interests might be drawn in question. * * * "

This holding is clear authority as to the Commission's right and obligation under Section 307(b) to consider all demands for facilities and service before it during the pendency of a proceeding involving such issue. Since administration of 307(b) is a continuing matter before the Commission insofar as applications are pending before it for any facilities or service as to communities at issue, it should follow that each of the three successive grants aforesaid, subsequent to the hearing on WHOL's application, must have been made upon a determination of public convenience, interest of necessity for such additional facilities or service, in contemplation of the Commission's prior proceedings or findings of a public need for the then existing stations and service proposals, including WHOL. The interrelationship between the Commission's Initial Decision and Order in the above entitled proceeding and the issues in the WHOL Notice of Further Hearing, warrant and require either a finding and conclusion for exclusion of one from the other or opportunity for consolidation and hearing.

1793 WHEREFORE, Allentown Broadcasting Corporation petitions for the grant of the following or alternative or such additional relief as may be proper, as follows:

A. Modify the above described Initial Decision by adding to the findings of fact and conclusions thereon a finding in effect that the determination of the authorization of unlimited hours of operation to WKAP is made in contemplation of the existence of all radio stations and radio service presently operating and provided to the Allentown com-

munity by the three existing unlimited time stations, including WHOL, and a conclusion to the effect that such grant for a fourth unlimited time station in Allentown and the radio service provided thereby presents no fact relevant or material to a determination of the issues set forth in the Commission's Order of February 16, 1950, and the application of WHOL in Docket No. 7180; or,

B. Set aside the said Initial Decision and stay the effective date of the Order thereon until such time as the Commission decision granting WHOL's application is finalized; or,

C. In the event the Commission is permitted or required to proceed with a further hearing in Docket No. 7180 for the taking of additional evidence, that WHOL be afforded an opportunity to be heard in opposition to and on a comparative basis with WKAP as to any or all issues relevant to radio facilities or radio service in the Allentown area, and that in any event the effective date and Order in the above entitled proceeding be stayed until final disposition of this petition.

Respectfully submitted,

ALLENTOWN BROADCASTING CORPORATION
By REED T. ROLLO
By DONALD C. BEELAR
Its Attorneys
914 National Press
Building
Washington 4, D. C.

July 28, 1950

* * * * * * * * * * *

1795 53209

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

Federal Communications Commission
August 7, 1950
Office of Secretary

In re Applications of

Docket No. 9132
File No. BP-6552

N. JOE RAHALL, SAM G. RAHALL, FARRIS E. RAHALL and DEEM F. RAHALL, a partnership d/b as WKAP, INC. (WKAP), Allentown, Pennsylvania

Docket No. 9133
File No. BP-6727

LACKAWANNA VALLEY BROADCASTING COMPANY (WSCR)
Scranton, Pennsylvania

For Construction Permits

Opposition to Petition for Hearing, Rehearing or Reconsideration

On July 28, 1950, Allentown Broadcasting Corporation (WHOL) filed a petition for hearing, rehearing or reconsideration, which is directed against the proposed grant of the above-entitled application (File No. BP-6552; Docket No. 9132) of WKAP, Inc. (WKAP), by Initial Decision released by the Examiner on July 11, 1950. For the reasons which follow a grant of this petition is opposed:

1. Briefly, what petitioner seeks is either consideration of its application with that of WKAP on a comparative basis or a stipulation in the decision granting the WKAP

application to the effect that the additional radio facilities authorized to Allentown by a grant of that application is not relevant to the further hearing which is scheduled on the application of Allentown Broadcasting Corporation.

2. The petitioner's application does not involve electrical interference with the application of WKAP; therefore, the two cannot be considered as mutually exclusive. Big Sioux Broadcasting Company, et al. 3 RR 1843 Petitioner's application is presently involved in a hearing involving
1796 an issue under Section 307(b) of the Communications Act of 1934, as amended. It, therefore, in effect urges that since an issue under 307(b) is presented in its hearing it is entitled to have the *status quo* maintained with respect to all facts which may be relevant to the issue under Section 307(b) until a final decision of its application, and that the non-maintenance of that *status quo* deprives petitioner of the hearing to which it is entitled under Section 309(a) of the Act.

3. These Sections of the Act compel no such result and in fact petitioner is proposing an unwarranted extension of the holdings of the Supreme Court in the case of Ashbacker Corporation vs. Federal Communications Commission, 326 U.S. 327. The Commission has consistently viewed Section 307(b) as setting out factors which must be considered in resolving conflicts between competing applicants, rather than as setting out a ground on which applications not involving engineering conflicts must be set down for hearing because of the existence of other non-conflicting applications and licensees in the area to be served. The Commission has on several occasions denied requests similar to the one involved in the instant petition. In re Paris Broadcasting Company, et al. 3 RR 1843, Beloit Broadcasters, Inc. 4 RR 90, and Big Sioux Broadcasting Company, et al. 3 RR 1407.

Wherefore, the premises considered, it is respectfully re-

quested that the petition of Allentown Broadcasting Corporation (WHOL) be denied.

Respectfully submitted,

/s/ HARRY M. PLOTKIN
Acting General Counsel

/s/ DWIGHT D. DOTY
/s/ ROBERT J. RAWSON
Attorneys
Federal Communications Commission

* * * * * * * * * * *

1798 Received Aug. 8, 1950

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

Docket No. 9132
File No. BP-6552

In re Application of

WKAP, INC., (WKAP)
Allentown, Pennsylvania

For Construction Permit

Petition to Dismiss Petition of Allentown Broadcasting Corporation Dated July 28, 1950

WKAP, Inc. (WKAP), Allentown, Pennsylvania, by its attorney, petitions the Commission to dismiss the Petition filed and dated July 28, 1950, by the Allentown Broadcasting Corporation (WHOL), Allentown, Pennsylvania, requesting a hearing, rehearing or reconsideration of Commission's action released July 11, 1950, proposing a grant of the above described application of WKAP, Inc. for a change in frequency to 1320 KC and an increase in hours of operation from daytime only to unlimited.

In support thereof Petitioner states the following:

1. The Commission on August 19, 1948, designated for a consolidated hearing the applications of WKAP, Allentown, Pennsylvania, and WSCR, Scranton, Pennsylvania, both requesting the frequency 1320 KC. The hearing on these applications was originally held on May 9, 10, 11 and 13, 1949, and thereafter the record was reopened on April 6, 1950, for the purpose of submitting additional evidence on the engineering issues involved therein. The further hearing was held on June 1 and 2, 1950, and the record was finally closed on the latter date.

2. Under the Commission's Rules (Sec. 1.894) a petition for rehearing or reconsideration must be filed within twenty (20) days after the effective date of the Order. The decision complained of by WHOL is not a final decision and no effective date has as yet been fixed. There is no basis, therefore, for consideration of this petition under Section 405 of the Act or Section 1.894 of the Commission's Rules.

3. Station WHOL was granted its construction permit on June 23, 1947, and there was timely filed an appeal from this decision in the U. S. Court of Appeals for the District of Columbia. In spite of this appeal WHOL at its
1799 own risk and with full knowledge of the fact that the Commission's decision in granting the permit might be reversed, proceeded with construction and operation of its station. On May 4, 1949, the Court of Appeals issued its decision remanding the case for further proceeding. Although the WKAP application was designated for hearing on August 19, 1948, and was heard before an examiner five days after the decision of the Court of Appeals, WHOL waited sixteen months thereafter to petition in order to participate in the decision effecting WKAP's application for fulltime operation in Allentown, Pennsylvania. The Commission's Rules provide under Section 1.724 that other applications will receive consideration if they are filed at least twenty (20) days before the date on which the hearing on the prior application is scheduled. No attempt was

made by WHOL during this period to request to participate in the hearing. This is a further reason why the instant petition of WHOL must be dismissed.

4. The Commission's attention is invited to its ruling of June 2, 1950, in re Petition for Rehearing of the Mt. Vernon Broadcasting Company 6 RR 388 (392) that in an adjudicatory proceeding the Commission is bound by its Rules and Standards and could not weigh against the Ashland applicant the effect of grants of other applicants which were made during and since the hearing in this proceeding. The Commission decided (6 RR 21) on February 20, 1950, on the applications of WHOL, Docket No. 7180; Easton Publishing Company, Docket No. 7174; and WEST, Docket No. 7441 that where a decision has been appealed and the court has remanded the matter for further proceedings on the comparative needs of two communities for additional radio services and the ability of the applicants to meet those needs a further hearing must be held in order that the decision may be based upon factors *existing at the present time.* (italics supplied) The decision of the Commission is supported by the decision of the U. S. Supreme Court in the Pottsville case (309 US 134, 1940).

1800 It has been shown above that the petition filed by WHOL has not been timely filed and has no legal standing under the Commission's Rules or the Communications Act.

WHEREFORE premises considered, WKAP, Inc. (WKAP), Allentown, Pennsylvania, prays that the Commission dismiss the petition for hearing, rehearing or reconsideration filed by Allentown Broadcasting Corporation (WHOL) dated July 28, 1950.

Respectfully submitted,

WKAP, INC. (WKAP)
By its Attorney
STEPHEN TUHY, JR.
406 Albee Building
Washington 5, D. C.

August 8, 1950

* * * * * * * * * * *

1802 BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

FCC 50-1220—54698

In re Applications of

WKAP, Inc. (WKAP)
Allentown, Pennsylvania
Docket No. 9132
File No. BP-6552

Lackawanna Valley Broadcasting Company (WSCR)
Scranton, Pennsylvania
Docket No. 9133
File No. BP-6727

For Construction Permits

Memorandum Opinion and Order

By the Commission: Commissioners Coy (Chairman) and Hyde not participating.

1. The Commission has before it a "Petition for Hearing, Rehearing, or Reconsideration," filed by Allentown Broadcasting Corporation (WHOL), Allentown, Pennsylvania, on July 28, 1950, directed against the Examiner's Initial Decision in the above-entitled proceeding. That Initial Decision, dated July 10, 1950 (released July 11, 1950), looks toward a grant of the above-entitled application of WKAP, Inc., licensee of Station WKAP, Allentown, Pennsylvania, for change in frequency and for increase in hours of operation from daytime only to unlimited time. WKAP's application was heard in a consolidated proceeding with the above-entitled application of Lackawanna Valley Broadcasting Company, licensee of Station WSCR, Scranton, Pennsylvania, also proposed to be granted in the Initial Decision. WHOL, however, disclaims any interest in the latter application, and its petition is con-

cerned only with the grant to WKAP. WHOL was not a party to the proceeding leading to the Initial Decision, nor has it sought to become one prior to the filing of the instant petition. An opposition to the WHOL petition was filed by the General Counsel of the Commission on August 7, 1950, and a "Petition to Dismiss" the petition was filed by WKAP on August 8, 1950.

2. Following hearings held in consolidation with other conflicting applications for operation in the Allentown-Easton, Pennsylvania, area, the Commission on June 23, 1947, issued a Decision (3 RR 1225) granting the application of Allentown Broadcasting Corporation (Docket No. 7180) for a construction permit for a station to operate unlimited time in Allentown, and pursuant thereto Station WHOL was constructed. A license for the operation of Station WHOL was issued on February 2, 1949. Easton Publishing Company, one of the unsuccessful applicants for an operation in Easton, took an appeal from the Commission's Decision to the United States Court of Appeals for the District of Columbia, and on May 4, 1949, the Court issued its decision (*Easton Publishing Company* v. *FCC*, 175 F. 2d 344) remanding the case to the Commission for further proceedings, "for findings upon the comparative needs of the two communities [Allentown and Easton] for new radio service and the relative abilities of the applicants to serve the greater need." On February 16, 1950, the Commission adopted a Memorandum Opinion and Order (released Februray 20, 1950, 6 RR 1), in which, among other things, it set aside its Decision of June 23, 1947, and designated for further hearing the application of Allentown Broadcasting Corporation (Docket No. 7180) together with two competing applications for Easton (Docket Nos. 7179 and 7441). In the same Memorandum Opinion and Order the Commission stayed the effectiveness of its Order of February 16, 1950, in so far as it withdrew the authority of Allentown Broadcasting Corporation to
1803 operate Station WHOL by virtue of the setting aside

of the Commission's Decision of June 23, 1947, pending the further hearing in the proceeding and the release of a final Decision therein.[1] Station WHOL is now being operated on this basis.

3. WHOL alleges that its interest in the WKAP proceeding (Docket No. 9132) "is based upon the provisions of Section 307(b) of the Communications Act of 1934, as amended, as interrelated with the issues set forth in the Commission's Notice of Hearing of February 16, 1950, in the further proceeding upon WHOL's application, entitled *In re Easton Publishing Co.*, Docket Nos. 7179, 7180 and 7441 . . ." Petitioner asserts that since it filed its application for a second fulltime station in Allentown (Docket No. 7180), "the Commission has made three additional grants of radio facilities to Allentown, i.e., (1) daytime grant to WKAP's predecessors, (2) grant of a third fulltime station in Allentown to WAEB, (3) the proposed grant of unlimited time to WKAP." In effect, WHOL in its petition contends that in an appraisal of the relative need for broadcast service in Allentown and Easton it is entitled to a comparison free from any consideration of the above grants, and declares that "it would be clearly inequitable, if not arbitrary, for the Commission at this time to subordinate WHOL to the junior grants aforesaid, including the proposed grant of unlimited time to WKAP, as to which WHOL has had no opportunity for hearing and no notice prior to February 20, 1950." It continues:

"In any event, such proposed grant of additional hours of operation and additional radio service to WKAP, for which the Initial Decision finds and concludes there is a public need, in addition to the radio facilities and radio

[1] As noted in the petition, "the scope and character of such further proceeding ordered or permitted under the judgment entered in the *Easton Publishing Co.* case were raised by [petitions for] writs of mandamus now pending on appeal (No. 9829) [in the *Easton Publishing Company* matter in the United States Court of Appeals for the District of Columbia Circuit] as to which oral argument was had on May 30, 1950." A decision has not yet been rendered by the Court in the mandamus matter.

service presently available to Allentown, including that of WHOL, either is or is not relevant to the WHOL Notice of Further Hearing [Memorandum Opinion and Order of February 16, 1950, 6 RR 21]. If not relevant, the Commission in said Initial Decision should clearly so stipulate by appropriate findings of fact and conclusions. If not so excluded as irrelevant, then WHOL in the event of a further proceeding on a reopened record, is entitled to an opportunity to be heard on a comparative basis with WKAP as to which facility or service in the public interest will result in better providing a fair, efficient and equitable distribution of radio service in the Allentown-Easton metropolitan area within the intent and purpose of Section 307(b)."

Petitioner requests, in the alternative, that the Commission (1) modify the Initial Decision of July 10, 1950, herein, by adding to the findings of fact and conclusions therein a statement to the effect "that the determination of the authorization of unlimited hours of operation to WKAP is made in contemplation of the existence of all radio stations and radio service presently operating and provided to the Allentown community by the three existing unlimited time stations, including WHOL, and a conclusion to the effect that such grant for a fourth unlimited time station in Allentown and the radio service provided thereby presents no fact relevant or material to a determination of the issues set forth in the Commission's Order of February 16, 1950, and the application of WHOL in Docket No. 7180;"
1804 or (2) set aside the Initial Decision herein of July 10, 1950, and stay its effective date "until such time as the Commission decision granting WHOL's application is finalized" (or, apparently, until a final decision is made on WHOL's application); or (3) if "permitted or required [by the Court of Appeals] to proceed with a further hearing in Docket No. 7180 for the taking of additional evidence," afford WHOL "an opportunity to be heard in

opposition to and on a comparative basis with WKAP as to any or all issues relevant to radio facilities or radio service in the Allentown area." In any event, it is requested that the effective date of the Initial Decision be stayed until final disposition of the petition.

4. We are of the opinion both that the petitioner lacks standing to present the instant petition and that on its merits the petition does not warrant the relief sought.

5. The Commission's Rules do not contemplate a "hearing, rehearing, or reconsideration" of an Initial Decision in the manner requested in the petition. Parties to a proceeding may file exceptions to an Initial Decision or take other appropriate procedural steps designed to stay its effectiveness. The possible interest of persons not parties to a hearing in relief from final action by the Commission is also recognized by the Rules (See Secs. 1.390 and 1.892[2]). Any claim by WHOL to participate as an intervenor in the WKAP proceeding would clearly not have been as of right, since no electrical interference is involved, but would have been entirely subject to the Commission's discretion (See Rules, Sec. 1.388). As above indicated, however, WHOL at no time prior to the filing of the present petition sought leave to become identified with the WKAP proceeding. To permit it now, as a complete stranger to the WKAP proceeding, to demand a ruling in and upon the Initial Decision therein for the purported purpose of aiding the prosecution of its own application for facilities in another proceeding, would be an unwarranted and unprecedented disruption of the Commission's processes.

6. We are also of the opinion, as above indicated, that the petition on its face does not state facts sufficient to justify relief. Petitioner urges, in effect, that since an issue under Section 307(b) of the Communications Act is

[2] Both Sections state that a petition for rehearing by a person not a party to a hearing shall show why it was not possible for him to participate earlier in the proceeding.

presented in its comparative hearing with the Easton applicants, it is entitled to an advance decision herein, apparently in the nature of a declaratory ruling, that its claim in its own proceeding should be considered without reference to the subsequent grants of authorizations for radio facilities in Allentown; or in the event of a further hearing in the Easton-Allentown proceeding that it "be afforded an opportunity to be heard in opposition to and on a comparative basis with WKAP." The factors to be regarded by the Commission in its determination of the comparative merits of WHOL's and the Easton applications can appropriately be considered in the proceeding involving those applications. The Communications Act, the Commission's Rules, and appropriate decisions do not contemplate comparative hearings as here requested except where there is electrical interference. It is patent, therefore that WHOL's application cannot be permitted to prevent a grant of WKAP's application, if a grant thereof would be in the public interest, and that no right of WHOL would be invaded by a grant of WKAP. [3]

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7. On previous occasions requests similar to those of WHOL have been before the Commission and have been denied. Thus, in *Beloit Broadcasters, Inc.*, 4 RR 90, 93 (1948), we said:

"We have heretofore considered the basic issue concerning comparative considereation of applications not involving engineering conflict raised by these petitions and have

[3] It is noted that in its Petition for Writ of Mandamus to the Court of Appeals, WHOL requests, among other things, a writ directing that any further hearing in the Allentown-Easton proceeding be "limited to the issue left open by the decision of this Court, i.e., issues nos. 4 and 5 of the Commission's hearing order entered February 20, 1950, and limited to the facts and authorizations as of the date of the Commission's original decision in this proceeding" (June 23, 1947), or that "any full proceeding on issues as set forth in the Commission's order of February 20, 1950, be conditioned by a further order to be issued by the Commission making all licensees of standard radio broadcasting stations in the community, which were not in operation on the date of the Commission's original hearing order in this proceeding, additional parties to such proceeding so that the Commission will have before it all interested parties and be in a position to take whatever actions are warranted on present day facts as to all such services and facilities after full hearing." The Commission has opposed the issuance of the writ.

said that such applications are not mutually exclusive and hence are not entitled to comparative consideration. In our Opinion and Order on Petitions for Rehearing In re Big Sioux Broadcasting Company, et al, File Nos. BP-4734, et al [3 RR 1407], adopted August 28, 1947, we specifically considered this problem. In that proceeding, petitioner contended that grants of two applications, neither of which involved electrical interference with petitioner's application, should be set aside because they added new service to the area proposed to be served by petitioner and thus reduce the need for service in its proposed service area. In this case we said [3 RR at 1410]:

"' . . . But these sections of the Act [Secs. 307(b) and 309(a)] compel no such result, and in fact petitioner is proposing an unwarranted extension of the holdings of the Supreme Court in the case of Ashbacker Corporation v. Federal Communications Commission, 326 U.S. 327.

"'In the Ashbacker case the court held that where there was [sic] pending at the same time two applications which could not both be granted because of the interference which would result from their simultaneous operation, the Commission could not, consistently with the requirements of Section 309(a) make a grant of one application and set the other down for hearing . . . The Ashbacker case certainly did not hold that an applicant is denied a hearing on its application whenever, during the pendency of that application, the Commission takes action otherwise within its
authority, one of the consequences of which may be
1806 to diminish the probabilities in favor of a grant of the pending application . . . '"

8. The *Big Sioux* case, cited in the foregoing extract from the *Beloit* case, also answers a contention made by WHOL in its petition that *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933), is "clear authority as to the Commission's right and obligation under Section 307(b) to consider all demands for

facilities and service before it during the pendency of a proceeding involving such issue." In *Big Sonix* (3 RR at 1411-12) we pointed out that present Section 307(b) superseded the cumbersome "Davis Amendment" (under which *Nelson Brothers* was decided) and we said that

" . . . in abandoning a system under which it was hoped that a precise equality of distribution of facilities could be constantly maintained, Congress certainly did not intend that the entire allocation picture or a substantial part of it be wholly reappraised with each new grant of an application which involves no interference with other licensees and applicants.

"For these reasons, the Commission has consistently viewed Section 307(b) as setting out factors which must be considered in resolving conflicts between competing applicants, rather than as setting out a ground on which applications not involving engineering conflicts must be set down for hearing because of the existence of other non-conflicting applications and licenses in the area to be served. On the facts of this case, petitioner in filing an application for the use of a clear channel which involves conflict in the use of that channel by a station in another area of the nation, cannot have held up assignments on two regional frequencies, which are available for assignment in petitioner's present and proposed service area, as well as in other regions of the nation, without electrical interference to petitioner."

9. Accordingly, It is Ordered, This 6th day of October, 1950, That the petition for hearing, rehearing or reconsideration, filed by Allentown Broadcasting Corporation (WHOL) on July 28, 1950, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE
Secretary

Released: October 6, 1950

315 In United States Court of Appeals for the District of Columbia Circuit

No. 11897

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
EASTON PUBLISHING COMPANY, INTERVENOR
WKAP, INC., INTERVENOR

No. 11957

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
WKAP, INC., INTERVENOR

APPEALS FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Decided August 19, 1954

[File endorsement omitted.]

Mr. Donald C. Beelar, with whom Messrs. Charles R. Cutler and Herbert J. Miller, Jr., were on the brief, for appellant. Mr. Reed T. Rollo entered an appearance for appellant.

Mr. Richard A. Solomon, Assistant General Counsel, Fed-
316 eral Communications Commission, with whom Miss Mary Jane Morris, Counsel, Federal Communications Commission, was on the brief, for appellee. Mr. J. Roger Wollenberg, Assistant General Counsel Federal Communications Commission, at time brief was filed, was also on the brief for appellee.

Mr. Eliot C. Lovett for intervenor Easton Publishing Company.

Mr. Stephen Tuhy, Jr., for intervenor WKAP, Inc.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges

Opinion

Filed August 19, 1954

BAZELON, Circuit Judge: This is an appeal from an order of the Federal Communications Commission granting the license appli-

cation of the Easton Publishing Company for the assignment of a standard radio station at Easton, Pennsylvania, and denying that of Allentown Broadcasting Corporation for the same assignment at Allentown, Pennsylvania, 14 miles away.[1] It marks the third appearance of these parties before this court since their mutually exclusive applications were filed in 1945.[2]

When the Easton Company first appealed to this court from a June 1947 order of the Commission awarding the license to the Allentown applicant, we remanded the case "for findings upon the comparative needs of the two communities for new radio
317 service and the relative abilities of the applicants to serve the greater need."[3] In February 1950, the Commission, rejecting a joint request for a final decision without further hearings, set aside the prior grant to Allentown, and reopened the record.[4] In March 1950, both applicants petitioned this court for writs of mandamus and prohibition directing the Commission to make a finding on the existing record. These petitions were denied on October 23, 1950,[5] and in March 1951, hearings in the reopened proceedings were commenced by the Commission.

Pursuant to our mandate, the Hearing Examiner made findings as to the comparative needs of the two communities, and the relative abilities of the applicants to serve the greater need. On the question of community need, the Hearing Examiner noted, inter alia, that Easton had only one standard broadcast station, whereas Allentown had three in addition to the one being operated by appellant under temporary authority of the Commission.[6] But in applying § 307 (b) of the Communications Act of 1934,[7] which requires the Commission to provide a "fair, efficient and equitable distribution of radio service * * *," the Examiner also noted that Allentown had a population about three times that
318 of Easton, and was growing at about four times the rate of Easton.[8] She concluded that the "over-all evidence" showed a greater need for additional service in Allentown. For this reason, and because she viewed the record as casting grave

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[1] The Allentown Corporation filed the appeal in case No. 11897 before the Commission acted upon its petition for rehearing; the appeal in case No. 11957 was filed after the Commission denied the petition for rehearing. Case No. 11897 is therefore dismissed as premature and we consider only the appeal in case No. 11957.

[2] By reason of the proximity of the two cities, simultaneous operation of the proposed stations would cause mutually destructive interference. Two other applicants for these facilities are no longer in the case.

[3] Easton Publishing Company v. Federal Communications Comm'n, 85 U. S. App. D. C. 33, 40, 175 F. 2d 344, 351 (1949).

[4] Allentown was, however, permitted to continue the operation of its Station WHOL, a license for which was granted on February 2, 1949, and which had been built in accordance with a construction permit dated June 8, 1948.

[5] Easton Publishing Company v. Federal Communications Comm'n, 87 U. S. App. D. C. 344, 185 F. 2d 987 (1950).

[6] See note 4, supra.

[7] 48 Stat. 1084 (1934), as amended, 47 U. S. C. § 307 (b) (1952).

[8] Easton had a population of 33,589 in 1940 and 31,410 in 1950, an increase of 2.4%; Allentown's population in 1940 was 96,904 and in 1950 was 106,233, an increase of 9.6%. No significant change is introduced by making a comparison in terms of the build-up communities contiguous to the two cities.

doubt upon the reliability of the Easton applicant,[9] her Initial Decision recommended a grant to the Allentown company.

The Commission in the order now challenged reversed the finding of a greater need in Allentown, and set aside various findings reflecting adversely on the ability shown by the Easton applicant to serve its community's need. It found that both applicants proposed well-balanced program service, that slight differences between the two with respect to equipment, management and the like, fairly well canceled out,[10] and that "considered separately" in terms of need for additional service of the type proposed by the applicants, "there is little room for choice between the two communities." [11]

In those circumstances of what it regarded as closely balanced community needs and applicant abilities, the Commission found the following to be the "decisive factor" in compelling a grant of the additional facility to Easton:

"* * * Allentown is presently served by three standard broadcast stations located in and broadcasting local programs for that city, as well as receiving daytime service from the station located in adjoining Bethlehem, while only one standard
319 broadcast station is located in and broadcast [sic] local programs for the Easton community. Thus, the residents of the Allentown community presently are afforded a choice between local standard broadcast programs and stations, a choice which can only be made available to the residents of the Easton community by means of an additional standard broadcast service."

This "choice of local service" principle is a gloss on § 307 (b) of the Communications Act of 1934, *supra*. It was first applied by the Commission in Northwestern Ohio Broadcasting Corp.,[12] upon the crucial findings that the choice between the two communities was "indeed a difficult one," [13] and that both applicants "propose[d] to render meritorious program services designed to meet the needs of the respective communities * * *." [14] Since we affirmed on appeal because there was "no error in the record," [15] our approval of the "choice of local service" principle was limited to its application in circumstances of otherwise approximately equivalent community need and applicant ability to serve such need. Although in the present case the Commission purported to find such equivalence, we think there is no substantial evidence in the record as a whole—including the Hearing Examiner's Ini-

[9] Initial Decision, Conclusion No. 37.
[10] Commission's Decision, Conclusion No. 12.
[11] Id., Conclusion No. 13.
[12] 3 Pike & Fischer Radio Reg. 1945 (1948).
[13] Id. at 1953, Conclusion No. 4.
[14] Id. at 1954, Conclusion No. 6.
[15] Sky Way Broadcasting Corp. v. Federal Communications Comm'n, 85 U. S. App. D. C. 425, 176 F. 2d 951 (1949).

tial Decision—to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal.[16] Hence, we hold the Commission's error is
320 fatal to the order under review and requires that the case be remanded for reconsideration by the Commission.

We discuss three phases of the record which compel us to this view. They are: (1) Uncertainty as to programming plans; (2) Reluctance, evasiveness and lack of candor; and (3) Monopoly and concentration of communications media.

(1) Uncertainty as to programming plans.—At the 1946 hearing, the Easton applicant indicated that it would acquire a network affiliation if at all possible, and its proposed program schedule at that time included a number of network programs. But at the 1951 hearing, its proposed program schedule contained no network programs, and no mention was made of possible network affiliation on direct examination. On cross-examination, however, the general manager of Easton, first flatly denied any present intention to affiliate,[18] then spoke of a "remote possibility
321 that sometime in the indefinite future we might affiliate,"[19] and, finally, admitted that if licensed, "we would probably explore the possibility" and if a desirable network affiliation were available would take affirmative steps to secure it.[20]

Although it is plain from this testimony that a network affiliation was contemplated, the Easton applicant, as the Hearing
322 Examiner pointed out, offered no testimony as to "what programs now proposed would be scrapped to make way

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[16] Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474 (1951).

[18] "By Mr. ROLLO:

"Q. I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network programs on your proposed AM schedule.—A. That is correct.

"Q. That is your present plan, is it?—A. That is the present plan.

"Q. You no longer desire to affiliate with Mutual?—A. There has been no conversation with Mutual in the past five years.

"Q. You recall you originally testified you planned to affiliate with Mutual, do you not?—A. I said we expected to discuss it with Mutual, but no arrangements have been made.

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"By Mr. SCHILDHAUSE:

"Q. Mr. Rounsley, you stated, did you not, that you had no current plans to affiliated your proposed AM station with the network?—A. That is correct."

[19] "Mr. ROLLO. Did not you answer a question of mine to the effect that you did not intend to affiliate with the network?

"The WITNESS. I did not say we did not intend to; I said we made no overtures at all. That is in *the remote possibility that sometime in the indefinite future we might affiliate.*" [Emphasis supplied.]

[20] "The PRESIDING OFFICER. Mr. Rounsley, I am a little confused about this network proposition. I wish you would tell me what your plans are with respect to network. Now let us not talk about the dim distant future, let us talk about something not quite so far away.

"The WITNESS. If we have an AM facility we would probably explore the possibility of a network affiliation. We would naturally have to see what was available, what the terms are, something we do not know now, but we would explore that possibility.

"The PRESIDING OFFICER. *Am I to understand you would not wait for somebody to come to you?*

"The WITNESS. *That is correct.* In other words, we would have to have something to affiliate before we talk business.

"The PRESIDING OFFICER. It is still not clear in my mind. Do you plan to sit by and wait for somebody to approach you, or what would be your procedure?

"The WITNESS. *I think we would probably see what was available, and after we saw what was available, if there was a network that we thought was desirable and available, we would probably call them.*" [Emphasis supplied.]

for network programs." Without such information, the Commission could not reasonably reach a conclusion in favor of the Easton Company on one of the crucial issues before it, namely, the Easton Company's ability to provide a choice of "locally originating programs."

(2) Reluctance, evasiveness, and lack of candor.—The Hearing Examiner concluded that Easton's principal witnesses were reluctant, evasive, and had "not made * * * frank, candid and honest disclosures * * *." Although this conclusion was based in large part upon an evaluation of the demeanor, bearing, delivery, etc., of the Easton witnesses who appeared before the Examiner,[21] the Commission felt obligated to make an independent evaluation of the evidence because "the Examiner's findings were primarily based on her evaluation of testimony by one witness rather than on her judgment as to the credibility of different witnesses who make contradictory statements * * *." We cannot agree that the Examiner's findings are entitled to any less weight than
322 findings which resolve a conflict between witnesses. Both involve a determination based upon an evaluation of the witnesses' demeanor, bearing and delivery; and it has been specifically held that the uncontradicted testimony of a single witness may be rejected on the basis of such factors, and that this is a judgment best made by the trier of fact who "had the witnesses before it * * *."[22]

The Commission, after independently examining the cold record, reversed the Examiner's findings and concluded that the testimony in question "properly viewed, gives an overall appearance of consistency, candor and straightforwardness."[23] But as Judge Learned Hand recently observed, "* * * we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the

[21] An examiner's findings "based on that part of the evidence which the printed words do not preserve" are not ordinarily reviewable by the agency. Judge Learned Hand in National Labor Relations Board v. Universal Camera Corp., 190 F. 2d 429, 430 (2d Cir. 1951). That the instant finding is not derived solely from evidence preserved in the printed record is illustrated by at least two findings of the Examiner. One Easton witness, she found, "when * * * questioned * * * *displayed an attitude* of evasiveness and lack of candor on the subject [of Easton's plans for a network affiliation]." [Emphasis supplied.] And she found that another witness, in testifying as to the circulation of newspapers in the Easton area, *"created the impression* that the EASTON EXPRESS [published by the applicant company] has substantial competition from the Allentown and Bethlehem daily newspapers." Attitudes displayed and impressions created by a witness are usually demonstrated by hesitations, intonations and inflections of voice, gestures, etc., as well as by what appears in the printed record.

[22] Quock Ting v. United States, 140 U. S. 417, 422 (1891); National Labor Relations Board v. Howell Chevrolet Co., 204 F. 2d 79, 86 (9th Cir., 1953), affirmed, 346 U. S. 482; Zimmer v. Acheson, 191 F. 2d 209, 212 (10th Cir. 1951). See National Labor Relations Board v. Dinion Coil Co., 201 F. 2d 484, 487-90 (2d Cir., 1952), for an excellent historical discussion of the limited role of reviewing courts in evaluating "demeanor evidence."

[23] Commission's Decision, Conclusion No. 4.

testimony as recorded." [24] We briefly describe certain
324 matters appearing in the cold record which convince us that there is no such substantial preponderance in the present testimony.

(a) In connection with the question of a network affiliation, the Easton witness, as noted earlier, first spoke of the "remote possibility * * * in the indefinite future" of a network affiliation, but later, under prodding, conceded that Easton would act affirmatively to acquire one if licensed.

(b) On direct examination, the President of the Easton Publishing Company testified that in addition to the EASTON EXPRESS, which his company published, dailies published in Allentown, Bethlehem, Bangor (Pennsylvania), Newark, Plainfield (New Jersey), New York City, and Philadelphia circulated in the Easton area. On cross-examination it developed that the combined Easton area circulation of the Allentown and Bethlehem dailies was around 500, compared to 44,400 for the EXPRESS. We think the Examiner rightly concluded that the witness sought to create the misleading impression that his newspaper had substantial competition from the Allentown and Bethlehem dailies.[25]

It cannot be said that the evasiveness and lack of candor of Easton's witnesses related to matters of little consequence, for the Easton Company's monopoly position and the provision of locally originating rather than network programs were issues of paramount importance in the proceedings before the Com-
325 mission. In any event, as the Supreme Court has made clear, the importance of the matters concerned, obscured or evaded

"* * * is beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose." [26]

(3) Monopoly and concentration of communications media.—The Easton applicant publishes the only newspaper in Easton. It

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[24] National Labor Relations Board v. Universal Camera Corp., 190 F. 2d 429, 430 (2d Cir. 1951). See also United States Steel Co. v. National Labor Relations Board, 196 F. 2d 459, 467 (7th Cir. 1952); Ohio Associated Tel. Co. v. National Labor Relations Board, 192 F. 2d 664, 668 (6th Cir. 1951).

While the Universal Camera case involved the judicial review provision of the Labor Management Relations Act, 1947 (61 Stat. 148 (1947)), the Supreme Court held that these provisions are equivalent to the judicial review provisions of the Administrative Procedure Act (60 Stat. 243-44 (1946), 5 U. S. C. § 1009 (e) (1952)), which apply to the instant proceeding. Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 487 (1951).

[25] Another example, which, if less significant, is nonetheless revealing, is the professed inability of the President of the Easton applicant to state the amount of dividends paid by his company for 1950. Since he had been with the company for 33 years, had attended weekly directors' meetings, and in addition to being president, was treasurer and a stockholder of the company, his claimed ignorance does not appear credible.

[26] Federal Communications Comm'n v. WOKO, Inc., 329 U. S. 223, 227 (1946).

is the licensee of one of two FM radio stations, and of the only television station in that community. Such concentration of communications media has been viewed by the Commission as contrary to the public interest,[27] and this court has upheld that view.[28] Although recognizing that diversification of news sources is a "public interest" factor, the Commission did not find it controlling here because (a) Easton's newspaper and radio operations would be "substantially separate"; and (b) there was no evidence that Easton had used its newspaper ownership "to attempt to obtain a monopoly over news sources * * *, or otherwise in a manner not in the public interest."

At the hearing the general manager of the proposed Easton station, an employee of the Easton Publishing
326 Company for 16 years, testified that he was assigned to "this phase of the Easton Publishing Company activities" because for many years he had thought "that a radio station would be a very, very valuable complement to our newspaper activities * * *." He also testified that "accounting and everything like that" for the FM station currently operated by the Easton applicant are handled by the EASTON EXPRESS. This scarcely portrays a picture of "substantially separate" operation.

There is no dispute that for twelve years, from 1936 to 1948, the EASTON EXPRESS failed to carry the program logs for Station WEST, the city's only standard broadcast station, although during that period it regularly carried the logs of the New York City network stations. While the Commission did not approve this practice, it felt that the change of heart since 1948 was "some indication of the lack of an intention to freeze out WEST," and concluded "that the Easton Publishing Company is not disqualified to be a station licensee solely because of its newspaper ownership and activities."

Such conduct may, of course, be a highly significant factor,[29] particularly when the offending applicant already enjoys a formidable control over communications media in the community. Whether the Commission considered this former practice in weighing the relative abilities of the competing applicants does not clearly appear from the record. But even if it did, it apparently deemed such conduct inconclusive in light of its findings that (1) the radio and newspaper operations would be "substantially separate," (2) Easton had not equivocated regarding its network

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[27] See, e. g., WSMB, Inc., 5 F. C. C. 55 (1938); R. R. Jackman (WREN), 5 F. C. C. 496 (1938); Louisville Times Co., 5 F. C. C. 554, 559 (1938).

[28] Scripps Howard Radio, Inc. v. Federal Communications Comm'n, 89 U. S. App. D. C. 13, 19, 189 F. 2d 677, 683, cert. denied, 342 U. S. 830 (1951); Plains Radio Broadcasting Co. v. Federal Communications Comm'n, 85 U. S. App. D. C. 48, 52, 175 F. 2d 359, 363 (1949).

[29] Cf. Mansfield Journal Co. v. Federal Communications Comm'n, 86 U. S. App. D. C. 102, 109, 180 F. 2d 28, 33 (1950).

affiliation and programming plans, and (3) its witnesses had presented consistent, candid, and straightforward testimony. Since we hold these findings erroneous, the Commission must re-
327 evaluate the effect of the Easton Company's news monopoly and its past conduct on the issue of the relative abilities of the two applicants to serve in the public interest. Upon such re-evaluation, these factors may well assume a different and perhaps decisive importance.

Contrary to appellant's contention, we think the Commission did consider existing or authorized FM and television facilities in Easton as bearing upon the relative needs of the communities for an additional AM facility.[30] Since operations under the television authorization did not commence until after the hearing, there is nothing in the record to show the extent to which actual operation has affected the need for an additional AM outlet for local self-expression in Easton. We are unwilling, however, in light of the protracted history of this controversy, to order a further hearing "to bring the record up to date * * *."[31]
328 We have considered other contentions advanced by appellant and find them without merit.

Reversed and remanded for a redetermination in accordance with this opinion.

PRETTYMAN, *Circuit Judge*, dissenting: I disagree with my brethren in this case, and, because I fear that the opinion advances some unwise new law in the administrative field, I state the reasons for my dissent.

I think there is in this record no proper ground upon which a court can reverse the Commission. When this case was here the first time[1] the Commission had held a comparative hearing upon mutually exclusive applications for a radio license, made findings of facts, and awarded a license to one of the applicants. In practical effect the award was to one of two competing communities located just fourteen miles apart. In a unanimous opinion this court discussed at length the features of a choice between two well-qualified applicants. We passed upon several conten-

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[30] See Easton Publishing Co. v. Federal Communications Comm'n, 85 U. S. App. D. C. 33, 38–40, 175 F. 2d 344, 349–51 (1949).

[31] Interstate Commerce Comm'n v. Jersey City, 322 U. S. 503, 514 (1944). The Court observed: "Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."

See also Communications Act Amendments, 1952, § 14 (b), 66 Stat. 720 (1952), 47 U. S. C. § 402 (b) (1952), providing that "unless otherwise ordered by the court * * *," the Commission shall give effect to the judgment of the court reversing an order of the Commission "upon the basis of the proceedings already had * * *."

[1] Easton Pub. Co. v. Federal Communications Comm'n, 85 U. S. App. D. C. 33, 175 F. 2d 344 (D. C. Cir. 1949).

tions attacking the Commission's award. In every instance, except one, we sustained the Commission. In that one instance the Commission had found that "Allentown is in greater need of another radio station than Easton" and that the Allentown applicant was better qualified to meet that need, but it made no finding which would indicate why or how it reached those conclusions. Because of that lack, when the findings were attacked we could not tell whether they were arbitrary or not.
329 For that lone reason we remanded the case. The opinion was quite explicit that the remand was to permit the Commission to make the missing findings as to the comparative needs of the communities and the relative abilities of the applicants to meet whichever was the greater need.

Upon the remand the Commission proposed to reopen the record for further evidence. Both applicants objected. They brought the matter back here. This court, again unanimously, held that it was the Commission's duty to award applications in satisfaction of public convenience, interest or necessity "at the time of the award". We declined to forbid the Commission's holding of further hearings. The hearings were held, and the Commission made findings. I have never seen more meticulous compliance with the requirements for findings by an administrative agency. There are sixty printed pages of them. They are full, understandable, and abundant in references to the evidence.

The reasoning upon which the Commission reached its ultimate decision is clearly stated and is fully justified by the record. After considering the applicants and the communities from every conceivable angle, it concluded that "on the basis of most of the above factors and other considerations advanced by the applicants," there was little room for choice. This was a natural and entirely proper conclusion. We had already remarked in the opinion upon the first appeal that to a disinterested eye two neighboring communities are often relatively the same in merit. The Commission continued: "There is one decisive factor, however, * * *." This was a proper and, indeed, highly commendable presentation of the view reached by the Commission. Many times two conflicting interests are well-balanced save for one decisive factor. It is the part of honesty to say so frankly, instead of weighting the factors which seem to favor the side which
330 must win and deflating the loser's assets. In the case at bar the decisive factor was clearly and succinctly stated. It was:

"Allentown is presently served by three standard broadcast stations located in and broadcasting local programs for that city as well as receiving daytime service from the station located in adjoining Bethlehem, while only one standard broadcast station

is located in and broadcast local programs for the Easton community."

If we can understand that conclusion, and if it is supported by the findings, and if the findings are supported by the evidence, our function as a reviewing court is nil. We cannot determine what is the public interest, etc., or where the balance between the applicants or the communities lies. We can only make sure that the Commission acted within its constitutional and statutory authority. I think it did so in this case, and I do not even formulate, much less express, any view upon the merit of its judgment. It, not the court, as the Supreme Court has frequently said, is the judge of the public interest. And it, not the court, has been empowered by the Congress to distribute radio licenses among the several States and communities. It cannot be arbitrary; a court will prevent that. But, if its conclusions on a comparative selection of a licensee are fairly found, a court has no power in the matter.

My brethren say there is no substantial evidence on the record as a whole "to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal." They specify the particulars in which they think the lack lies.

First. The court says that there is no substantial evidence on the record as a whole to support the Commission, in that the Easton applicant was uncertain as to its programming plans. The point centers about the testimony of a Mr. Rounsley. I do not read that testimony as my brethren do. It seems to me that the cross-
331 examining attorney was trying to make the witness say things the cross-examiner wanted him to say but with which the witness did not agree. The witness insisted that, while Easton had no then-present plans for affiliation, it would, if it got the license, see what was available in the way of network affiliation and if a desirable one was available "we would probably call them." The cross-examiner tried to make him say that Easton did not intend to affiliate with a network, but the witness refused to say that. I see nothing indefinite about that testimony under the circumstances. Easton had not been on the air. The applications for the license had been pending six years. To hold extant a firm commitment from a network for that length of time would appear to me to be an amazing feat, and an unblushing affirmative assertion about securing a network contract would seem to me to be pure and simple sales talk. On the other hand Allentown had been on the air since February 1949, having been granted a license in the early stages of this proceeding. It had a network affiliation. At the hearing in 1951 Allentown was definite as to what it would do if it kept its license; it would continue to do what

it was doing. Easton might well have been thinking that if it ousted Allentown from the disputed license it might take over Allentown's network contract.

To me it seems completely unrealistic to say that there is no substantial evidence in a record to support a finding of equal ability of two applicants because the applicant which had been operating under a license for two years was definite as to its program contracts while the applicant who was merely hoping at that stage and had to rely upon future events to make firm outside commitments was uncertain about them. If that is to be a policy the initial winner in the early rounds of one of these battles has a well-nigh insurmountable advantage over its rivals. The
332 issue is ability—not past performance but future ability.

The court seems to say that, if the initial loser cannot be definite and firm as to his program contracts, there is no substantial evidence to support a finding that his ability is equal to that of his rival who has been on the air pendente lite. To me this part of the court's view is without substantial foundation and is erroneous in the processes of its reasoning.

Second. The court says that there was no substantial evidence on the record as a whole to support the Commission's finding, in that Easton's principal witnesses were reluctant, evasive, and lacked candor. The hearing examiner held to that effect; the Commission overruled her on the matter; the court says that the Commission erred, because certain matters convince the court that there was no substantial preponderance in the testimony against the trial examiner's view.

The court relies upon a statement by Judge Learned Hand in the Universal Camera case.[2] But Judge Hand was writing after the original decision in that case, supported by an opinion by him, had been reversed by the Supreme Court.[3] The natural frame of mind consequent to such circumstance moved Judge Frank to a delightful concurrence which throws much light upon the opinion of Judge Hand. The Labor Board had in that case reversed a finding made by one of its examiners. The Second Circuit was puzzled by the situation thus created but held that while the Board could not ignore an examiner's findings a reviewing court could not consider the Board's action in reversing the finding a factor in the court's own decision. The Supreme Court discussed the matter at length.[4] It held that an examiner's findings
333 are not as unassailable as are a special master's under the Civil Rules;[5] that "The 'substantial evidence' standard is

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[2] National Labor Relations Bd. v. Universal Camera Corp., 190 F. 2d 429 (2d Cir. 1951).

[3] Universal Camera Corp. v. Labor Bd., 340 U. S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951).

[4] Id., 340 U. S. at 492-497.

[5] A master's findings are reversible only if clearly erroneous. Fed. R. Civ. P. 53 (e) (2).

not modified in any way when the Board and its examiner disagree"; that evidence may be less substantial when an examiner has rejected it than it is when he adopts it; that his findings "are to be considered along with the consistency and inherent probability of testimony"; and that "The significance of his report, of course, depends largely on the importance of credibility in the particular case."

With the Supreme Court opinion on the point before us, we look at the case at bar. The examiner held that "management officials" of Easton "have been reluctant, evasive and evidenced a lack of candor". She specified instances on the part of the president and general manager (one man) and said "Other examples of evasiveness and lack of candor on the part of the general manager" of the proposed Easton station were considered, but I do not find what those examples were. Exception to the findings have been filed, the Commission considered them and failed to find the evasiveness and lack of candor the examiner found. The examples she cited, and which the court now discusses, are easy to consider upon the face of the record. They are not premised upon demeanor.

The first example is the program planning which we have discussed. I not only do not see evasiveness or lack of candor in it; the testimony seems fair, honest and complete to me. The second example is that the president of the company could not testify to the amount of the dividends declared in the year 1950. Here are the pertinent questions and answers, as they appear in the joint appendix before us:

334 "Q. Did the corporation declare dividends last year?—A. Yes.

"Q. What was the size of the dividend?

"* * *

"* * * A. I don't know that without checking the record."

To me that testimony was not evasive and did not lack candor. Corporate officials testifying to a maze of figures, as this one was, frequently insist upon reference to the records for detailed figures as a matter of caution and accuracy. Indeed wise counsel forewarn witnesses against testifying by unrefreshed recollection on corporate statistics. If the object of the examination is the truth, the records are the best evidence. If the object is to test credibility, corporate statistics are not the field in which to do it. In the present case the records were available; indications are they were in the hearing room. I think the witness demonstrated commendable care.

The third example is that the president of the company testified to the published circulation figures of several newspapers which were circulated in the Easton area but upon cross-examina-

tion it developed that the actual circulation of those papers in Easton itself was very small. The examiner said that by the direct testimony "he created the impression that the Easton Express has substantial competition from the Allentown and Bethlehem daily newspapers", whereas, in fact, as he showed on cross-examination, this competition did not exist. The question asked this witness on direct examination was prefaced by a remark by his counsel that in some prior hearing a question had been asked about the circulation of a Bethlehem, Pennsylvania, paper; the witness was asked if he had that figure. He replied that an association of newspapers published those figures, and he read the published figures for a number of newspapers into the record. His counsel then passed on to other matters. Opposing counsel picked up the subject and asked about the circulation figures in the Easton city zone. The witness read the figures from the same publication.

335 I note a few features of this episode. (1) No false statement is alleged to have been made. One counsel asked for some figures, and his opponent asked for more. All were truly given. (2) The nub of the present point is an impression on the part of the examiner that the witness attempted to create an impression. If it was an attempt by the witness it was not too smart an attempt. All the figures were apparently in the same publication, readily available to anybody. (3) The point was trivial. The Easton Press is the only paper published in Easton. How many out-of-town papers were sold there was of minimal importance. (4) Trial counsel generally will be startled to learn that, if they inquire about a subject and an opponent develops further facts about it, this court is of opinion that the failure of initial full development upon direct examination can, in the absence of any false statement, be used as a basis for reducing all the testimony on that side of the case to less than substantiality. I think so mighty a conclusion cannot properly be drawn from so tiny a premise.

So, when I examine the three examples given in support of the position that Easton's principal witnesses were reluctant, evasive, and lacked candor, which are instances easily checked on the written record, I find no substance whatever. As to other instances of evasion, etc., not identified by the examiner, I cannot consider them, because I do not know what they are. Neither does the court know.

My brethren say that the examiner's conclusions as to reluctance and evasion were based upon demeanor, bearing, delivery, etc., and in a footnote refer to the examiner's findings as to attitudes and impressions. This is a wide departure from the proper purpose and use of the demeanor test in respect to testimony as I under-

stand it. The demeanor of a witness may be an indication whether he is or is not telling the truth. It is a reactor of credi-
336 bility. But if a witness is telling the truth, his demeanor in telling it is no factor in its acceptability. The parade of witnesses is not a popularity contest. The truth need not fall trippingly from the lips; it may come haltingly, timorously, cautiously. But if it is the truth, the mannerisms of its delivery are no detraction. And so if a witness tells the truth, a hearing officer cannot say, "To be sure, he told the truth but I got an impression that he would have liked to deceive me, and so I will not accept his statements." The examiner in the case at bar did no such thing as that. She found evasion and lack of candor in what the witness did, not in how he did it. She rejected his testimony because of the substance of it, not because of the demeanor of the witness in the delivery of it. For example, in respect to the newspaper circulation incident, she found evasion in the fact that the witness on direct examination read into the record the total circulation figures but not the Easton area circulation. She did not find evasion because of his manner of reading. There is no question as to the truth of the figures he read. Whether he was myopic, unnecessarily cautious or meticulous, stuttered or spluttered was no part of her consideration, as I understand her reasoning. She found evasion because he read some figures and did not read others. The same observations apply to the other item mentioned by my brethren, the network plans. The evasion found by the examiner was in the substance of the testimony. She simply did not believe that the Company had made no plans. If the witness had said it with the charm of a television commercial, she still would not have believed it. Demeanor was not the index of the evasion; the substance of what was said was evasive in the examiner's view. I think the examples of alleged evasiveness in this case are precisely the sort which an agency can itself evaluate upon the record.

The Commission itself found no evasiveness and reversed
337 its examiner's conclusions. The Supreme Court held in Universal Camera, supra, that the findings of the hearing examiner do not have to be clearly erroneous to be reversed by the agency. "The responsibility for decision", said the Court, "thus placed on the Board" is inconsistent with the clearly-erroneous requirement.[6]

This court reverses the Commission on this point because it finds no substantial preponderance in the evidence against the examiner's views. The court gets that rule, as I have pointed out, from Judge Hand's comment upon the Supreme Court opinion in Universal Camera. I am not sure what Judge Hand's statement

[6] Supra note 3, 340 U. S. at 492.

means in the abstract, when read in the light of the Supreme Court's clear statement that an examiner's findings can be reversed by the agency for less than clear error. But I am sure that his statement does not deny the power of the agency in a case like the one before us. In the first place the lack of justification for the examiner's conclusions in the three instances she specified is as clear as a record can be. In the second place even the total of the three examples is no justification whatever for the blanket conclusion that there is no substantial evidence. The cited examples, even if accurately evaluated, are only small reeds; they are not footings for a heavy superstructure. I think my brethren are in flat conflict with the Supreme Court ruling when they reverse the Commission on these differences between the Commission and its hearing examiner.

Moreover the court seems to equate an agency's power to reverse its own examiner's finding with a reviewing court's power to reverse the agency's finding. It cites cases dealing with a court's power. This is interesting because in one cited Second Cir-
338 cuit case[7] Judge Frank cites and quotes from another Second Circuit opinion,[8] in which the court differentiated between "testimonial inferences", based upon estimates of credibility, and "derivative inferences", inferred from the testimony. The court may disregard the latter, said Judge Frank, and added: "And we must disregard such a finding when the derivative inference either is not rational or has but a flimsy foundation in the testimony."[9] The conclusions in dispute in the case at bar, as made by the trial examiner, were most truly "derivative inferences", and moreover, to my way of thinking, had but flimsy foundations in the testimony. They could, and should, have been disregarded by the Commission. Furthermore I do not think the power of the court to reverse the agency is as extensive as is the power of the agency to reverse its examiner. That is the plain teaching of the Universal Camera case and also of the Administrative Procedure Act, as I read them. And such is the reasonable rule, because the whole rationale of administrative procedure rests upon findings by the agency, the body empowered by Congress to make the adjudication. Of course, in a disputed finding which depends upon demeanor, or upon some other feature better estimated by the person who sees the witnesses, observes their gestures, delays, etc., and hears their intonations, inflections and emphases, that person is best able to resolve the dispute. But where findings are made from factual data, or factual statements, the responsibility for the action is upon the agency itself. In such instances it cannot be bound to make a finding which it does not believe to be

[7] National Labor Relations Board v. Dinion Coil Co., 201 F. 2d 484 (2d Cir. 1952).
[8] American Tobacco Co. v. The Katinge Hadjipatera, 194 F. 2d 449 (2d Cir. 1951).
[9] Id. at 451.

accurate. In the case before us the alleged "evasiveness" was not a matter of demeanor but a matter of factual substance of testimony.

339 Third. The court entitles this part "Monopoly and concentration of communications media." The facts are important. There is now only one standard broadcast station in Easton; it is not owned by the present applicant. Allentown has three standard stations. In respect to standard stations, therefore, the question is whether Easton should have a second station, bringing competition to a present monopoly, or Allentown should have four. Of course many other considerations enter, all as pointed out in our opinion in the first appeal. For example, Easton has two FM stations, one of which is owned by appellee, while Allentown has one operating and one under-consideration FM station. It is agreed that so far as receivers are concerned the FM broadcasts are a minor consideration. The point here is that the "monopoly" feature is not a simple black-and-white problem.

In the next place the permissible amount of concentration of mass communication, involving broadcast stations and newspapers, is peculiarly a problem for the Commission. Here, indeed, is a regulatory problem. Ownership of a station by a newspaper can hardly be denounced per se. In the District of Columbia, two of the four radio-television stations are owned by newspapers. In the instant case the Commission weighed many factors in this connection and produced a judgment on the point. I think the court should let it alone.

On the basis of the foregoing three considerations—(1) indefiniteness of program plans, (2) evasiveness of witnesses, and (3) concentration of communication media—the court concludes that there is no substantial evidence on the record as a whole to support the Commission's conclusion that the ability of Easton to serve its community is equal to the ability of Allentown to serve its community. I think, as I have indicated, that none of the three specifications has substance. I think, further, that the conclusion of the court does not follow from

340 its specifications. Even if Easton's program plans were indefinite as to network affiliation, and its witnesses were evasive in the manner specified (network plans, unrefreshed recollection as to dividends, and the newspaper circulation matter), and the local newspaper would own one of the two standard radio stations, it does not follow that there is no substantial evidence of Easton's equal ability. There is ample evidence in the record on the point, as the fully documented findings readily show. The court does not merely differ with the Commission upon the relative evaluation of the applicants' abilities. It does not merely say there is less evidence in support of Easton than in support

of Allentown. It strikes relative evaluation entirely from the case. It says there is no substantial evidence—none—in favor of Easton. It might be proper (although I would not agree with it) for the court to say that in view of the three specifications it is of opinion that the evidence of the ability of Easton is less than the evidence of the ability of Allentown. But it could not reverse the Commission on that basis. It can reverse only if there is no substantial evidence, on the record as a whole, to support the Commission's conclusion. The court finds no such evidence. I think its conclusion to that effect is not supported even by the three specifications it makes. It seems to me that the court is merely substituting its judgment for the judgment of the Commission as to which of these two applicants should have the license. It has no power to do that.

I would affirm.

341 In the United States Court of Appeals for the District of Columbia Circuit

APRIL TERM, 1954

No. 11897

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
EASTON PUBLISHING COMPANY, INTERVENOR
WKAP, INC., INTERVENOR

No. 11957

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
WKAP, INC., INTERVENOR

APPEALS FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before WILBUR K. MILLER, PRETTYMAN, and BAZELON, Circuit Judges

Judgment

Filed August 19, 1954

[File endorsement omitted.]

These appeals came on to be heard on the transcript of the record from the Federal Communications Commission, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the Federal Communications Commission appealed from in Case No. 11957 be, and it is hereby, reversed, and that said case be, and it is hereby, remanded to the said Federal Communications Commission for a redetermination in accordance with the opinion of this Court.

It is further ordered by the Court that the appeal in Case No. 11897 be, and it is hereby, dismissed as premature.

Dated August 19, 1954.

Per Circuit Judge BAZELON.

Separate dissenting opinion by Circuit Judge Prettyman.

342 [Designation of record omitted in printing.]

343 [Clerk's certificate to foregoing transcript omitted in printing.]

344 Supreme Court of the United States

No. 451, October Term, 1954

Order allowing certiorari

Filed January 10, 1955

[Title omitted.]

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

ALLENTOWN BROADCASTING CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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General Counsel,
Federal Communications Commission,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

ALLENTOWN BROADCASTING CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on August 19, 1954.

OPINION BELOW

The opinion of the Court of Appeals (App. 1a-31a) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1954 (App. 1a). The juris-

diction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. The Court of Appeals held that the Federal Communications Commission, in deciding between mutually exclusive applications for broadcast stations in different communities, pursuant to Section 307(b) of the Communications Act of 1934, as amended, can determine that one community's need for a second station outweighs the needs of the other community which already has a multiplicity of local services, only if it has first found that both applicants are approximately equal in their ability to serve their respective communities. The first question is whether such a holding imposes an undue limitation upon the exercise of the administrative licensing powers of the Commission.

2. Whether, under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, the court below improperly substituted its judgment for that of the Commission on the inferences to be drawn from undisputed facts, largely by holding that the Commission's conclusions concerning the qualifications of a proposed licensee to operate a station in the public interest, when such conclusions differ from those of its hearing examiner, must be supported by a "very substantial preponderance" in the evidence.

STATUTE INVOLVED

Section 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 49 Stat. 1475, 47 U. S. C. 307(b), provides as follows:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

This petition seeks review of a judgment reversing a decision and order of the Federal Communications Commission which granted the application of Easton Publishing Company (Easton) for a construction permit for a new standard broadcast station at Easton, Pennsylvania, and denied the mutually exclusive application of Allentown Broadcasting Corporation (Allentown) for a construction permit for a new standard broadcast station on the same frequency at Allentown, Pennsylvania.[1] The two applications are mutually exclusive because of the proximity of the two communities. Although neither proposed station would render service to the other community, the interference caused by either one to the other would have been such as to preclude the grant of both applications (R. 156, App. 2a).

The Easton and Allentown applications were the subject of a full comparative hearing before the

[1] Also before the reviewing court was a Memorandum Opinion and Order of the Commission denying Allentown's petition for rehearing of its decision to grant the Easton application (R. 257-263).

Commission.[2] Each of the parties introduced evidence respecting its service proposals and the needs for service of the respective communities which each intended to serve in the light of the broadcast service already available to those communities. The hearing examiner's Initial Decision (R. 53-147) proposed to grant the Allentown application and deny the Easton application. The examiner's choice of the Allentown applicant was based primarily upon a comparison of the relative ability of the applicants to serve their respective communities. While she found both had the minimum qualifications of broadcast licensees, the examiner considered that the Allentown applicant was better qualified to serve its community—in large part because of her belief that the Easton applicant had shown evasiveness and lack of candor in its testimony and that Easton's proposed programming

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[2] These applications were first considered in a hearing which culminated, in June 1947, in a grant to Allentown based on a determination that Allentown was in greater need of an additional broadcast facility than was Easton and that consequently a grant to Allentown was required by Section 307(b) of the Communications Act, 47 U.S.C. 307(b) (see App. 3a, 16a). This decision was reversed by the Court of Appeals for the District of Columbia Circuit on the ground that the Commission had not set forth the findings upon which this determination was based, *Easton Publishing Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 33, 175 F. 2d 344. Upon remand, the Commission ordered a further hearing on the ground that the existing record was inadequate, affirmed in *Easton Publishing Co.* v. *Federal Communications Commission*, 87 U.S. App D.C. 344, 185 F. 2d 987. The decision which is the subject of the instant case was the result of the further hearing.

could not be relied upon to meet community needs in view of the alleged uncertainty as to whether the Easton station would have a network affiliation (R. 132-145). The examiner also concluded that no determination could be made as to the relative need of the Easton and Allentown communities for additional radio stations on the basis of their population and the number of stations currently assigned to such communities (R. 145-146). She found, however, for unspecified reasons, that the overall evidence in the record showed a greater need for additional radio service in Allentown than in Easton (R. 146).

After considering exceptions to the Initial Decision and oral argument by the parties, the Commission issued its Final Decision granting the Easton application (R. 156-216). The Commission, as had the examiner (R. 132), found both applicants qualified to be broadcast licensees (R. 204-207). In doing so, the Commission considered the examiner's findings with respect to the evasiveness and lack of candor of Easton's witnesses, even though the examiner had not found this to be a disqualifying factor, but significant only in comparing the two applicants. The Commission concluded that the examiner's findings on this subject were based on her evaluation of the testimony of record.[3]

[3] In this connection the Commission stated (R. 205):

> These findings were based primarily on what was thought to be conflicts in the testimony of such witnesses, the eliciting by cross-examination of certain information which the Examiner considered should have been made

and concluded on the basis of its own evaluation of that testimony and of the record as a whole that there was no persuasive indication of reluctance, evasiveness or lack of candor on the part of Easton's witnesses (R. 204-205).

The Commission held that the principal issue in the proceeding was "which of the two communities involved has the greater need for additional standard broadcast service" within the meaning of Section 307(b) of the Communications Act, which requires the Commission to distribute licenses in such a manner as to provide a fair, efficient and equitable distribution of radio services among the various states and communities of the United States (R. 209). It pointed out that each community received radio service from stations located in other cities, and that in addition each community received local service, Allentown from the three stations located there, and Easton from the single station licensed in that city (R. 209-210). The Commission concluded that in terms of the types of programs proposed to be broadcast by each applicant, each community had a need sufficient to justify the addi-

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clear during the witness' direct testimony, and a professed lack of knowledge of a matter which the Examiner considered the witness reasonably should have known. Because of the seriousness of the matter and the fact that the Examiner's findings were primarily based on her evaluation of testimony by one witness rather than on her judgment as to the creditability of different witnesses who make contradictory statements, we feel that we are obligated to independently evaluate the evidence in question, giving due weight to the opinion of the Examiner and the contentions of the parties.

tional service and that on this basis there was little room for choice between the two communities (R. 210-211). The decisive factor in determining which community had the greater need for a new station was held to be a lack in Easton of a choice between locally originated standard broadcast programs (R. 211-212). The Commission further found that the Easton applicant was qualified to meet this need for a choice of locally originated programs, and therefore granted its application (R. 214-215).

On appeal by respondent, the court below, with Judge Prettyman dissenting, reversed the decision of the Commission.[4] The court held that one of the "essential underlying" findings necessary for application of the choice of local service principle, upon which the Commission's decision was based, was that the respective applicants possess approximately equivalent ability to serve the needs of their respective communities (App. 6a). It concluded that the Commission had made such a finding, but had erred in doing so because the record as a whole did not provide adequate support for it. The court referred to three factors relating to Easton's proposal, all of which had been considered by the Commission, but with respect to which the majority thought that the record did not support a conclusion that Easton was as qualified as Allentown. These were the alleged indefiniteness of Easton's

[4] A companion case No. 11,897, brought while Allentown's petition for rehearing was still pending before the Commission was dismissed as premature (App. 2a). Review of that decision is not sought.

program plans, the purported evasiveness and lack of candor of its witnesses, and the fact that the Easton applicant owned and published the only newspaper published in Easton (App. 6a-14a).

Judge Prettyman, dissenting, contends that the court had exceeded its function as a reviewing court and improperly substituted its views for those of the Commission in determining whether the public interest would best be served by a grant of the Easton or Allentown application. In his view, that policy determination was one for the Commission to make, and the function of the reviewing court was merely to decide whether the policy is reasonable and supported by the findings and the evidence (App. 18a, 30a-31a). He found the findings to be "full, understandable, and abundant in references to the evidence" and more than adequate to support the Commission's conclusions (App. 17a). With respect to the alleged evasiveness of Easton's witnesses, Judge Prettyman held that the court had engaged in a "wide departure from the proper purpose and use of the demeanor test in respect to testimony" and had misapplied the decision of this Court in the *Universal Camera* case. (App. 20a-29a).

REASONS FOR GRANTING THE WRIT

We think that the decision below denies erroneously, in two major respects, the role of the Federal Communication Commission in administering the Communications Act. First, the court below has substituted its judgment for that of the Commission in an area of licensing policy which the Congress has

entrusted to the Commission. Secondly, it has misconceived the proper relationship between the Commission and its hearing examiners under the Communications Act and the Administrative Procedure Act. In both respects, the decision below, if permitted to stand, would have a serious impact not only upon the Commission but upon other Federal agencies administering important regulatory statutes.

1. Section 307(b) of the Communications Act directs the Commission to so distribute broadcasting facilities "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." The Commission has determined that under this Congressional policy preference should be given to providing a listenable signal in all areas, to affording communities initial facilities for local expression and, where both of these higher priorities have been met, to affording communities a choice of local facilities. It was this latter factor which the Commission found decisive in the present case, where Allentown had three existing local facilities and Easton only one. However, the majority of the court below set aside the Commission's order granting the Easton application on the ground that there was no substantial evidence "to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal." And the court emphasized that its prior[5]

[5] In *Sky Way Broadcasting Corp. v. Federal Communications Commission*, 176 F. 2d 951, affirming *Northwestern Ohio Broadcasting Corp.*, 12 F.C.C. 727.

"approval of the 'choice of local service' principle was limited to its application in circumstances of otherwise approximately equivalent need *and applicant ability to supply such need*" (emphasis supplied). Thus, it has held, without citation of authority or analysis of the Act, that the Commission can apply the "choice of local service" factor only after the abilities of the applicants to serve the needs of their respective communities have been found to be approximately equal.

We submit that this holding is clearly erroneous, and imposes an undue limitation on the exercise of the Commission's licensing powers. In Section 307(b), Congress has directed an equitable distribution of broadcasting facilities among communities, rather than to the most deserving of competing applicants. Of course, mutually exclusive applications to serve the same community are resolved (assuming a need for service) by a comparison of the competing applicants' ability to serve the need. *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. 327. However, where mutually exclusive applications seek authority to serve different communities, the Commission determines first which community has the greater need for additional service, and then determines which applicant can best serve its need. This interpretation by the Commission of its power and duty under the Act is a reasonable one, and under familiar principles should not be set aside by the courts.

In the instant case, the Commission first found, applying the "choice of local service" principle, that Easton had a greater need for additional service than Allentown (a finding not challenged by the court below). Thereupon, finding that the only applicant to serve Easton was qualified, it granted the application of the Easton applicant. However, under the decision below, the Commission must compare the qualifications of the Easton and Allentown applicants and if, for example, the Allentown applicant is "better" qualified, its application must be granted without regard to whether or to what extent Easton's need for additional service exceeds that of Allentown. This subordination of community needs to applicants' relative abilities can only tend to create and perpetuate inequitable distribution of broadcasting facilities as between communities, in disregard of the policy declared by Congress in Section 307(b) and applied by the administrative agency established by Congress to carry it out.

It should be noted that the court below mistakenly concluded that the Commission had made a finding as to the comparative ability of the Easton and Allentown applicants to serve their respective communities. To the contrary, the Commission not only did not make such a finding but specifically refused to do so, stating that since it had found Easton to have the greater need for additional service, it was only necessary to determine whether the Easton applicant, the only one available to serve

Easton, was able to serve the needs of Easton (R. 258-259).

At the very least, the determination of the weight to be accorded to the comparative community needs for additional service as against the comparative qualifications of applicants seeking to serve different communities, is a part of the task of formulating a national broadcasting policy which Congress has vested primarily in the Commission, under broad statutory standards, rather than in the courts. *National Broadcasting Co.* v. *United States*, 319 U. S. 190. And even if the question is viewed narrowly as one of interpreting the direction of Congress for an equitable distribution of broadcasting services, the Commission's construction of the Act is entitled to great weight. *National Labor Relations Board* v. *Hearst*, 322 U. S. 111, 130-131. In any event, its judgment should not be set aside, as it was here, without any specification by the court below of its unreasonableness in law or in fact.

The issue has substantial importance in the future administration of the Communications Act. For in the aural broadcasting field (where there are over 2700 AM standard broadcast stations alone), and increasingly in television broadcasting as well, the problem no longer is to make usable signals available for all people or even to provide the first outlets for local expression, but rather to achieve the most equitable distribution of multiple facilities between communities. The decision of the court below, however, makes effectuation of a reasonable Commission policy, expressed by rule in the Com-

mission's Television Allocation Plan (Vol. 1, Part 3, Pike & Fischer Radio Reg. 91:620), and consistently followed in standard broadcast licensing proceedings where the need of one community for an additional station is demonstrably greater than the need of the other, dependent upon what the Commission properly regards as an extraneous and often meaningless comparison of the relative qualifications of competing applicants seeking to serve different communities.

2. The court below also rejected, as unsupported by substantial evidence, what it mistakenly thought was a finding by the Commission that the ability of the Easton and Allentown applicants to serve their respective communities was about equal. In so doing, it has seriously misapplied this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, as to the effect of an agency's rejection of its hearing examiners' findings.

The court's conclusion as to a lack of substantial evidence falls under three headings: (1) the uncertainty of the Easton applicant as to its program plans; (2) reluctance, evasiveness and lack of candor on the part of the Easton applicant's principal witnesses; and (3) monopoly and concentration of communications media in Easton.

With respect to items (1) and (3)—the likelihood that Easton would broadcast programs of local origin which would give the Easton community the choice of local programming which it lacked, and whether the Easton applicant's news-

paper and radio activities would be substantially separate—there is no question as to the basic facts as they appear in the record. There was no disputed testimony on these subjects, and the basic findings adopted by the Commission were essentially those of the examiner (compare R. 102-104 with R. 199-201 and R. 66, 133 with R. 170-172). These matters were carefully considered by the Commission and it reached conclusions contrary to those of the examiner with respect to their significance (R. 214-215, 206-207). The court below, in reversing the conclusions of the Commission and adopting those of the examiner on these matters (App. 6a-8a, 12a-14a), did not find that the significance accorded the basic findings by the Commission was unreasonable or arbitrary. Its opinion can fairly be read only as manifesting its agreement with the reasoning of the examiner rather than that of the Commission. As Judge Prettyman stated in his dissent (App. 31a):

> It seems to me that the court is merely substituting its judgment for the judgment of the Commission as to which of these two applicants should have the license.

We assume that the factors in items (1) and (3) would become largely irrelevant if this Court should hold, as we contend above, that the Commission was under no duty to make a comparative evaluation of the applicants' ability to serve their respective communities. And if the Commission is only required to determine whether the Easton applicant is qualified, it is clear that the Commis-

sion's conclusions on these matters were supported by substantial evidence and should have been sustained by the court below.

More important, because it might preclude the grant of a license to the Easton applicant under any construction of Section 307(b), is the holding of the majority of the court below that the Commission was without power to reject its hearing examiner's findings that the Easton applicant's principal witnesses "have been reluctant, evasive and evidenced a lack of candor", unless the Commission's contrary finding is supported by a "very substantial preponderance in the testimony" (App. 8a-12a).[6]

In *Universal Camera Corp.* v. *National Labor Relations Board, supra*, this Court weighed the statutory responsibility of the Board for administering the National Labor Relations Act against the status and function of hearing examiners under the Administrative Procedure Act, in determining the extent to which a finding of the Board is weakened by the fact that its hearing examiner made a contrary finding. The balance was struck in the following terms (340 U. S. at 492, 496):

> * * * The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse

[6] These findings of the hearing examiner pervade her other conclusions and those of the majority below because they were derived from the testimony of the Easton applicant's witnesses on the subjects of programming and concentration of communications media.

an examiner's findings only when they are "clearly erroneous." Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.

* * * * * * *

We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.
* * *

Thus, it clearly appears that this Court has already rejected the view of the court below that an agency may reject its hearing examiner's findings only if they are clearly erroneous, *i.e.*, only if the rejection

is supported by a "very substantial preponderance in the testimony."[7]

Moreover, this Court emphasized in *Universal Camera* (at p. 496) that "the significance of [the hearing examiner's] report, of course, depends largely on the importance of credibility in the particular case." In the instant case, the majority of the court below found that the examiner's conclusion that the Easton applicant's witnesses were reluctant, evasive and lacking in candor "was based in large part upon an evaluation of the demeanor, bearing, delivery, etc." of those witnesses during the hearing. To begin with, it should be noted that the case does not involve contradictory statements by different witnesses which often must be resolved by factors of demeanor which are lost in the printed record. More important, as Judge Prettyman pointed out in his dissenting opinion (App. 26a), the hearing examiner did not even assert that her conclusion was based upon the de-

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[7] That the quoted phrase, taken from Judge Learned Hand's opinion in *Universal Camera* upon remand from this Court (190 F. 2d 429, 430), overstated the holding of this Court is indicated not only by Judge Frank's concurring opinion on the remand of that case, but also by the later opinion of the Second Circuit in *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 490, which characterizes *Universal Camera* as holding that "the Board must give considerable weight to findings of an Examiner *based directly upon the 'hearing and delivery' of witnesses who orally testified before him*" (emphasis supplied). In that case, the hearing examiner specifically referred to his observation of the witnesses as part of the basis for his refusal to believe some of them.

meanor or attitude of Easton's witnesses; rather it is quite clear that her conclusion was based upon the substantive content of their answers to questions—matter which the Commission can evaluate as well as its hearing examiners. Moreover, as Judge Prettyman further stated, the issue was not one of veracity at all, but one of whether adverse inferences as to character should be drawn from testimonial statements, admittedly true, which at most were amplified upon further questioning.

Under these circumstances, we submit that *Universal Camera* did not limit the Commission's power to reject its examiner's finding and to make a contrary finding upon such an issue, entwined as it is with what is essentially an exercise of judgment in appraising the qualifications of a proposed licensee to carry out his promise of operating a station in the public interest. Since the issue was not one of veracity but of the inferences, if any, to be drawn from the substance of recorded testimony, and to make a judgment of policy thereon, the only question on review was whether the Commission's finding was supported by substantial evidence on the whole record, without giving conclusive or primary significance to the trial examiner's finding.

As this Court recognized in *Universal Camera*, Congress has placed in agency heads the responsibility for administering important regulatory statutes. That responsibility is impaired if the findings of hearing examiners on matters not involving veracity, or which are not in fact based largely

and specifically upon demeanor evidence, are made unreviewable by the agency. Cf. *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786 (C.A. 7), certiorari dismissed, 344 U.S. 206. Indeed, the decision below has the effect of reposing authority as to policy matters in hearing examiners who are responsible to no one, rather than in the agency heads who are responsible to Congress and the President. Thus, it has serious implications bearing on the relationship between all Federal regulatory agencies and their hearing examiners. Both this case and *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, *supra*, reveal a misunderstanding as to the scope of this Court's decision in *Universal Camera* which can be resolved only by this Court.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BAKER,
General Counsel,
Federal Communications Commission.

NOVEMBER 1954.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11897

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

EASTON PUBLISHING COMPANY, INTERVENOR

WKAP, INC., INTERVENOR

No. 11957

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WKAP, INC., INTERVENOR

Appeals from an Order of the Federal Communications Commission

Decided August 19, 1954

Mr. Donald C. Beelar, with whom Messrs. Charles R. Cutler and Herbert J. Miller, Jr., were on the brief, for appellant. Mr. Reed T. Rollo entered an appearance for appellant.

Mr. Richard A. Solomon, Assistant General

Counsel, Federal Communications Commission, with whom Miss Mary Jane Morris, Counsel, Federal Communications Commission, was on the brief, for appellee. Mr. J. Roger Wollenberg, Assistant General Counsel, Federal Communications Commission, at time brief was filed, was also on the brief for appellee.

Mr. Eliot C. Lovett for intervenor Easton Publishing Company.

Mr. Stephen Tuhy, Jr., for intervenor WKAP, Inc.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges

BAZELON, *Circuit Judge:*

This is an appeal from an order of the Federal Communications Commission granting the license application of the Easton Publishing Company for the assignment of a standard radio station at Easton, Pennsylvania, and denying that of Allentown Broadcasting Corporation for the same assignment at Allentown, Pennsylvania, 11 miles away.[1] It marks the third appearance of these parties before this court since their mutually exclusive applications were filed in 1945.[2]

[1] The Allentown Corporation filed the appeal in case No. 11897 before the Commission acted upon its petition for rehearing; the appeal in case No. 11957 was filed after the Commission denied the petition for rehearing. Case No. 11897 is therefore dismissed as premature and we consider only the appeal in case No. 11957.

[2] By reason of the proximity of the two cities, simultaneous operation of the proposed stations would cause mutually destructive interference. Two other applicants for these facilities are no longer in the case.

When the Easton Company first appealed to this court from a June 1947 order of the Commission awarding the license to the Allentown applicant, we remanded the case "for findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need."[3] In February 1950, the Commission, rejecting a joint request for a final decision without further hearings, set aside the prior grant to Allentown, and reopened the record.[4] In March 1950, both applicants petitioned this court for writs of mandamus and prohibition directing the Commission to make a finding on the existing record. These petitions were denied on October 23, 1950,[5] and in March 1951, hearings in the reopened proceedings were commenced by the Commission.

Pursuant to our mandate, the Hearing Examiner made findings as to the comparative needs of the two communities, and the relative abilities of the applicants to serve the greater need. On the question of community need, the Hearing Examiner noted, *inter alia*, that Easton had only one standard broadcast station, whereas Allentown had three in addition to the one being operated by appellant

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[3] Easton Publishing Company v. Federal Communications Comm'n, 85 U.S. App. D.C. 33, 40, 175 F. 2d 344, 351 (1949).

[4] Allentown was, however, permitted to continue the operation of its station WHOL, a license for which was granted on February 2, 1949, and which had been built in accordance with a construction permit dated June 8, 1948.

[5] Easton Publishing Company v. Federal Communications Comm'n, 87 U.S. App. D.C. 344, 185 F. 2d 987 (1950).

under temporary authority of the Commission.[6] But in applying § 307(b) of the Communications Act of 1934,[7] which requires the Commission to provide a "fair, efficient and equitable distribution of radio service * * *," the Examiner also noted that Allentown had a population about three times that of Easton, and was growing at about four times the rate of Easton.[8] She concluded that the "over-all evidence" showed a greater need for additional service in Allentown. For this reason, and because she viewed the record as casting grave doubt upon the reliability of the Easton applicant,[9] her Initial Decision recommended a grant to the Allentown company.

The Commission in the order now challenged reversed the finding of a greater need in Allentown, and set aside various findings reflecting adversely on the ability shown by the Easton applicant to serve its community's need. It found that both applicants proposed well-balanced program service, that slight differences between the two with respect to equipment, management and the like, fairly well canceled out,[10] and that "considered separately" in terms of need for additional service of the type pro-

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[6] See note 4, *supra*.

[7] 48 Stat. 1084 (1934), as amended, 47 U.S.C. § 307(b) (1952).

[8] Easton had a population of 33,589 in 1940 and 34,410 in 1950, an increase of 2.4%; Allentown's population in 1940 was 96,904 and in 1950 was 106,233, an increase of 9.6%. No significant change is introduced by making a comparison in terms of the built-up communities contiguous to the two cities.

[9] Initial Decision, Conclusion No. 37.

[10] Commission's Decision, Conclusion No. 12.

posed by the applicants, "there is little room for choice between the two communities."[11]

In those circumstances of what it regarded as closely balanced community needs and applicant abilities, the Commission found the following to be the "decisive factor" in compelling a grant of the additional facility to Easton:

> "* * * Allentown is presently served by three standard broadcast stations located in and broadcasting local programs for that city, as well as receiving daytime service from the station located in adjoining Bethlehem, while only one standard broadcast station is located in and broadcast [sic] local programs for the Easton community. Thus, the residents of the Allentown community presently are afforded a choice between local standard broadcast programs and stations, a choice which can only be made available to the residents of the Easton community by means of an additional standard broadcast service."

This "choice of local service" principle is a gloss on § 307(b) of the Communications Act of 1934, *supra*. It was first applied by the Commission in *Northwestern Ohio Broadcasting Corp.*,[12] upon the crucial findings that the choice between the two communities was "indeed a difficult one,"[13] and that both applicants "propose[d] to render meri-

[11] *Id.*, Conclusion No. 13.
[12] 3 Pike & Fischer Radio Reg. 1945 (1948).
[13] *Id.* at 1953, Conclusion No. 4.

torious program services designed to meet the needs of the respective communities * * *."[14] Since we affirmed on appeal because there was "no error in the record,"[15] our approval of the "choice of local service" principle was limited to its application in circumstances of otherwise approximately equivalent community need and applicant ability to serve such need. Although in the present case the Commission purported to find such equivalence, we think there is no substantial evidence in the record as a whole—including the Hearing Examiner's Initial Decision—to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal.[16-17] Hence, we hold the Commission's error is fatal to the order under review and requires that the case be remanded for reconsideration by the Commission.

We discuss three phases of the record which compel us to this view. They are: (1) Uncertainty as to programming plans; (2) Reluctance, evasiveness and lack of candor; and (3) Monopoly and concentration of communications media.

(1) Uncertainty as to programming plans. At the 1946 hearing, the Easton applicant indicated that it would acquire a network affiliation if at all possible, and its proposed program schedule at that

[14] *Id.* at 1954, Conclusion No. 6.

[15] Sky Way Broadcasting Corp. v. Federal Communications Comm'n, 85 U.S. App. D.C. 425, 176 F. 2d 951 (1949).

[16-17] Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951).

time included a number of network programs. But at the 1951 hearing, its proposed program schedule contained no network programs, and no mention was made of possible network affiliation on direct examination. On cross-examination, however, the general manager of Easton, first flatly denied any present intention to affiliate,[18] then spoke of a "remote possibility that sometime in the indefinite future we might affiliate,"[19] and, finally, admitted that if licensed, "we would probably explore the possibility" and if a desirable network affiliation were available would take affirmative steps to secure it.[20]

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[18] "By Mr. Rollo:

"Q. I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network programs on your proposed AM schedule. A. That is correct.

"Q. That is your present plan, is it? A. That is the present plan.

"Q. You no longer desire to affiliate with Mutual? A. There has been no conversation with Mutual in the past five years.

"Q. You recall you originally testified you planned to affiliate with Mutual, do you not? A. I said we expected to discuss it with Mutual, but no arrangements have been made.

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"By Mr. Schildhause:

"Q. Mr. Rounsley, you stated, did you not, that you had no current plans to affiliate your proposed AM station with the network? A. That is correct."

[19] "Mr. Rollo: Did not you answer a question of mine to the effect that you did not intend to affiliate with the network?

"The Witness: I did not say we did not intend . . . I said we made no overtures at all. That is in *the remote possibility that some time in the indefinite future we might affiliate.*" [Emphasis supplied.]

[20] "The Presiding Officer: Mr. Rounsley, I am a little confused about this network proposition. I wish you would tell

Although it is plain from this testimony that a network affiliation was contemplated, the Eastern applicant, as the Hearing Examiner pointed out, offered no testimony as to "what programs now proposed would be scrapped to make way for network programs." Without such information, the Commission could not reasonably reach a conclusion in favor of the Easton Company on one of the crucial issues before it, namely, the Easton Company's ability to provide a choice of "locally originating programs."

(2) Reluctance, evasiveness, and lack of candor. The Hearing Examiner concluded that Easton's principal witnesses were reluctant, evasive, and had "not made * * * frank, candid and honest disclosures * * *." Although this conclusion was based in large part upon an evaluation of the de-

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me what your plans are with respect to network. Now let us not talk about the dim distant future, let us talk about something not quite so far away.

"The Witness: "If we have an AM facility we would probably explore the possibility of a network affiliation. We would naturally have to see what was available, what the terms are, something we do not know now, but we would explore that possibility.

"The Presiding Officer: *Am I to understand you would not wait for somebody to come to you?*

"The Witness: *That is correct.* In other words, we would have to have something to affiliate before we talk business.

"The Presiding Officer: It is still not clear in my mind. Do you plan to sit by and wait for anybody to approach you, or what would be your procedure?

"The Witness: *I think we would probably see what was available, and after we saw what was available, if there was a network that we thought was desirable and available, we would probably call them.*" [Emphasis supplied.]

meanor, bearing, delivery, etc., of the Easton witnesses who appeared before the Examiner,[21] the Commission felt obligated to make an independent evaluation of the evidence because "the Examiner's findings were primarily based on her evaluation of testimony by one witness rather than on her judgment as to the credibility of different witnesses who make contradictory statements * * *." We cannot agree that the Examiner's findings are entitled to any less weight than findings which resolve a conflict between witnesses. Both involve a determination based upon an evaluation of the witnesses' demeanor, bearing and delivery; and it has been specifically held that the uncontradicted testimony of a single witness may be rejected on the basis of such factors, and that this is a judgment best made

[21] An examiner's findings "based on that part of the evidence which the printed words do not preserve" are not ordinarily reviewable by the agency. Judge Learned Hand in National Labor Relations Board v. Universal Camera Corp., 190 F. 2d 429, 430 (2d Cir. 1951). That the instant finding is not derived solely from evidence preserved in the printed record is illustrated by at least two findings of the Examiner. One Easton witness, she found, "when * * * questioned * * * *displayed an attitude* of evasiveness and lack of candor on the subject [of Easton's plans for a network affiliation]." [Emphasis supplied.] And she found that another witness, in testifying as to the circulation of newspapers in the Easton area, "*created the impression* that the *Easton Express* [published by the applicant company] has substantial competition from the Allentown and Bethlehem daily newspapers." Attitudes displayed and impressions created by a witness are usually demonstrated by hesitations, intonations and inflections of voice, gestures, etc., as well as by what appears in the printed record.

by the trier of fact who "had the witnesses before it * * *."[22]

The Commission, after independently examining the cold record, reversed the Examiner's findings and concluded that the testimony in question "properly viewed, gives an overall appearance of consistency, candor and straightforwardnes.."[23] But as Judge Learned Hand recently observed, " * * * we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."[24] We briefly describe certain matters appearing in the cold record which convince us that there is no such substantial preponderance in the present testimony.

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[22] Quock Ting v. United States, 140 U.S. 417, 422 (1891); National Labor Relations Board v. Howell Chevrolet Co., 204 F. 2d 79, 86 (9th Cir. 1953), *affirmed*, 346 U.S. 482; Zimmer v. Acheson, 191 F. 2d 209, 212 (10th Cir. 1951). See National Labor Relations Board v. Dinion Coil Co., 201 F. 2d 484, 487-90 (2d Cir. 1952), for an excellent historical discussion of the limited role of reviewing courts in evaluating "demeanor evidence."

[23] Commission's Decision, Conclusion No. 4.

[24] National Labor Relations Board v. Universal Camera Corp., 190 F. 2d 429, 439 (2d Cir. 1951). See also United States Steel Co. v. National Labor Relations Board, 196 F. 2d 459, 467 (7th Cir. 1952); Ohio Associated Tel. Co. v. National Labor Relations Board, 192 F. 2d 664, 668 (6th Cir. 1951).

While the Universal Camera case involved the judicial review provision of the Labor Management Relations Act, 1947 (61 Stat. 148 (1947)), the Supreme Court held that these provisions are equivalent to the judicial review provisions of the Administrative Procedure Act (60 Stat. 243-44 (1946), 5 U.S.C. § 1009(e) (1952)), which apply to the instant proceeding. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 487 (1951).

(a) In connection with the question of a network affiliation, the Easton witness, as noted earlier, first spoke of the "remote possibility * * * in the indefinite future" of a network affiliation, but later, under prodding, conceded that Easton would act affirmatively to acquire one if licensed.

(b) On direct examination, the President of the Easton Publishing Company testified that in addition to the *Easton Express*, which his company published, dailies published in Allentown, Bethlehem, Bangor (Pennsylvania), Newark, Plainfield (New Jersey), New York City, and Philadelphia circulated in the Easton area. On cross-examination it developed that the combined Easton area circulation of the Allentown and Bethlehem dailies was around 500, compared to 44,400 for the *Express*. We think the Examiner rightly concluded that the witness sought to create the misleading impression that his newspaper had substantial competition from the Allentown and Bethlehem dailies.[25]

It cannot be said that the evasiveness and lack of candor of Easton's witnesses related to matters of little consequence, for the Easton Company's monopoly position and the provision of locally-originating rather than network programs were issues of paramount importance in the proceedings before the Commission. In any event, as the Supreme

[25] Another example, which, if less significant, is nonetheless revealing, is the professed inability of the President of the Easton applicant to state the amount of dividends paid by his company for 1950. Since he had been with the company for 33 years, had attended weekly directors' meetings, and in addition to being president, was treasurer and a stockholder of the company, his claimed ignorance does not appear credible.

Court has made clear, the importance of the matters concealed, obscured or evaded

> " * * * is beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose."[26]

(3). Monopoly and concentration of communications media. The Easton applicant publishes the only newspaper in Easton. It is the licensee of one of two FM radio stations, and of the only television station in that community. Such concentration of communications media has been viewed by the Commission as contrary to the public interest,[27] and this court has upheld that view.[28] Although recognizing that diversification of news sources is a "public interest" factor, the Commission did not find it controlling here because (a) Easton's newspaper and radio operations would be "substantially separate"; and (b) there was no evidence that Easton had used its newspaper ownership "to attempt to

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[26] Federal Communications Comm'n v. WOKO, Inc., 329 U.S. 223, 227 (1946).

[27] See, *e.g.*, WSMB, Inc., 5 F.C.C. 55 (1938); R. R. Jackman (WREN), 5 F.C.C. 496 (1938); Louisville Times Co., 5 F.C.C. 554, 559 (1938).

[28] Scripps-Howard Radio, Inc. v. Federal Communications Comm'n, 89 U.S. App. D.C. 13, 19, 189 F. 2d 677, 683, *cert. denied*, 342 U.S. 830 (1951); Plains Radio Broadcasting Co. v. Federal Communications Comm'n, 85 U.S. App. D.C. 48, 52, 175 F. 2d 359, 363 (1949).

obtain a monopoly over news sources * * *, or otherwise in a manner not in the public interest."

At the hearing the general manager of the proposed Easton station, an employee of the Easton Publishing Company for 16 years, testified that he was assigned to "this phase of the Easton Publishing Company activities" because for many years he had thought "that a radio station would be a very, very valuable complement to our newspaper activities * * *." He also testified that "accounting and everything like that" for the FM station currently operated by the Easton applicant are handled by the *Easton Express*. This scarcely portrays a picture of "substantially separate" operation.

There is no dispute that for twelve years, from 1936 to 1948, the *Easton Express* failed to carry the program logs for Station WEST, the city's only standard broadcast station, although during that period it regularly carried the logs of the New York City network stations. While the Commission did not approve this practice, it felt that the change of heart since 1948 was "some indication of the lack of an intention to freeze out WEST," and concluded "that the Easton Publishing Company is not disqualified to be a station licensee solely because of its newspaper ownership and activities."

Such conduct may, of course, be a highly significant factor,[29] particularly when the offending ap-

[29] Cf. Mansfield Journal Co. v. Federal Communications Comm'n, 86 U.S. App. D.C. 102, 109, 180 F. 2d 28, 33 (1950).

plicant already enjoys a formidable control over communications media in the community. Whether the Commission considered this former practice in weighing the relative abilities of the competing applicants does not clearly appear from the record. But even if it did, it apparently deemed such conduct inconclusive in light of its findings that (1) the radio and newspaper operations would be "substantially separate," (2) Easton had not equivocated regarding its network affiliation and programming plans, and (3) its witnesses had presented consistent, candid, and straightforward testimony. Since we hold these findings erroneous, the Commission must re-evaluate the effect of the Easton Company's news monopoly and its past conduct on the issue of the relative abilities of the two applicants to serve in the public interest. Upon such re-evaluation, these factors may well assume a different and perhaps decisive importance.

Contrary to appellant's contention, we think the Commission did consider existing or authorized FM and television facilities in Easton as bearing upon the relative needs of the communities for an additional AM facility.[30] Since operations under the television authorization did not commence until after the hearing, there is nothing in the record to show the extent to which actual operation has affected the need for an additional AM outlet for

[30] See Easton Publishing Co. v. Federal Communications Comm'n, 85 U.S. App. D.C. 33, 38-40, 175 F. 2d 344, 349-51 (1949).

local self-expression in Easton. We are unwilling, however, in light of the protracted history of this controversy, to order a further hearing "to bring the record up to date * * *."[31]

We have considered other contentions advanced by appellant and find them without merit.

Reversed and remanded for a redetermination in accordance with this opinion.

PRETTYMAN, *Circuit Judge*, dissenting: I disagree with my brethren in this case, and, because I fear that the opinion advances some unwise new law in the administrative field, I state the reasons for my dissent.

I think there is in this record no proper ground upon which a court can reverse the Commission.

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[31] Interstate Commerce Comm'n v. Jersey City, 322 U.S. 503, 514 (1944). The Court observed: "Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." See also Communications Act Amendments, 1952, § 14 (b), 66 Stat. 720 (1952), 47 U.S.C. § 402(h) (1952), providing that "unless otherwise ordered by the court * * *," the Commission shall give effect to the judgment of the court reversing an order of the Commission "upon the basis of the proceedings already had * * *."

When this case was here the first time[1] the Commission had held a comparative hearing upon mutually exclusive applications for a radio license, made findings of facts, and awarded a license to one of the applicants. In practical effect the award was to one of two competing communities located just fourteen miles apart. In a unanimous opinion this court discussed at length the features of a choice between two well-qualified applicants. We passed upon several contentions attacking the Commission's award. In every instance, except one, we sustained the Commission. In that one instance the Commission had found that "Allentown is in greater need of another radio station than Easton" and that the Allentown applicant was better qualified to meet that need, but it made no finding which would indicate why or how it reached those conclusions. Because of that lack, when the findings were attacked we could not tell whether they were arbitrary or not. For that lone reason we remanded the case. The opinion was quite explicit that the remand was to permit the Commission to make the missing findings as to the comparative needs of the communities and the relative abilities of the applicants to meet whichever was the greater need.

Upon the remand the Commission proposed to reopen the record for further evidence. Both applicants objected. They brought the matter back

[1] Easton Pub. Co. v. Federal Communications Comm'n, 85 U.S. App. D.C. 33, 175 F. 2d 344 (D.C. Cir. 1949).

here. This court, again unanimously, held that it was the Commission's duty to award applications in satisfaction of public convenience, interest or necessity "at the time of the award". We declined to forbid the Commission's holding of further hearings. The hearings were held, and the Commission made findings. I have never seen more meticulous compliance with the requirements for findings by an administrative agency. There are sixty printed pages of them. They are full, understandable, and abundant in references to the evidence.

The reasoning upon which the Commission reached its ultimate decision is clearly stated and is fully justified by the record. After considering the applicants and the communities from every conceivable angle, it concluded that "on the basis of most of the above factors and other considerations advanced by the applicants," there was little room for choice. This was a natural and entirely proper conclusion. We had already remarked in the opinion upon the first appeal that to a disinterested eye two neighboring communities are often relatively the same in merit. The Commission continued: "There is one decisive factor, however, * * *." This was a proper and, indeed, highly commendable presentation of the view reached by the Commission. Many times two conflicting interests are well-balanced save for one decisive factor. It is the part of honesty to say so frankly, instead of weighting the factors which seem to

favor the side which must win and deflating the loser's assets. In the case at bar the decisive factor was clearly and succinctly stated. It was:

> "Allentown is presently served by three standard broadcast stations located in and broadcasting local programs for that city, as well as receiving daytime service from the station located in adjoining Bethlehem, while only one standard broadcast station is located in and broadcast local programs for the Easton community."

If we can understand that conclusion, and if it is supported by the findings, and if the findings are supported by the evidence, our function as a reviewing court is nil. We cannot determine what is the public interest, etc., or where the balance between the applicants or the communities lies. We can only make sure that the Commission acted within its constitutional and statutory authority. I think it did so in this case, and I do not even formulate, much less express, any view upon the merit of its judgment. It, not the court, as the Supreme Court has frequently said, is the judge of the public interest. And it, not the court, has been empowered by the Congress to distribute radio licenses among the several states and communities. It cannot be arbitrary; a court will prevent that. But, if its conclusions on a comparative selection of a licensee are fairly found, a court has no power in the matter.

My brethren say there is no substantial evidence on the record as a whole "to support the essential

underlying finding that the ability of the applicants to serve their respective communities was about equal." They specify the particulars in which they think the lack lies.

First. The court says that there is no substantial evidence on the record as a whole to support the Commission, in that the Easton applicant was uncertain as to its programming plans. The point centers about the testimony of a Mr. Rounsley. I do not read that testimony as my brethren do. It seems to me that the cross-examining attorney was trying to make the witness say things the cross-examiner wanted him to say but with which the witness did not agree. The witness insisted that, while Easton had no then-present plans for affiliation, it would, if it got the license, see what was available in the way of network affiliation and if a desirable one was available "we would probably call them." The cross-examiner tried to make him say that Easton did not intend to affiliate with a network, but the witness refused to say that. I see nothing indefinite about that testimony under the circumstances. Easton had not been on the air. The applications for the license had been pending six years. To hold extant a firm commitment from a network for that length of time would appear to me to be an amazing feat, and an unblushingly affirmative assertion about securing a network contract would seem to me to be pure and simple sales talk. On the other hand Allentown had been on the air since February, 1949, having been granted a license in the early

stages of this proceeding. It had a network affiliation. At the hearing in 1951 Allentown was definite as to what it would do if it kept its license; it would continue to do what it was doing. Easton might well have been thinking that if it ousted Allentown from the disputed license it might take over Allentown's network contract.

To me it seems completely unrealistic to say that there is no substantial evidence in a record to support a finding of equal ability of two applicants because the applicant which had been operating under a license for two years was definite as to its program contracts while the applicant who was merely hoping at that stage and had to rely upon future events to make firm outside commitments was uncertain about them. If that is to be a policy the initial winner in the early rounds of one of these battles has a well-nigh insurmountable advantage over its rivals. The issue is ability—not past performance but future ability. The court seems to say that, if the initial loser cannot be definite and firm as to his program contracts, there is no substantial evidence to support a finding that his ability is equal to that of his rival who has been on the air *pendente lite*. To me this part of the court's view is without substantial foundation and is erroneous in the processes of its reasoning.

Second. The court says that there was no substantial evidence on the record as a whole to support the Commission's finding, in that Easton's principal witnesses were reluctant, evasive, and lacked

candor. The hearing examiner held to that effect; the Commission overruled her on the matter; the court says that the Commission erred, because certain matters convince the court that there was no substantial preponderance in the testimony against the trial examiner's view.

The court relies upon a statement by Judge Learned Hand in the *Universal Camera* case.[2] But Judge Hand was writing after the original decision in that case, supported by an opinion by him, had been reversed by the Supreme Court.[3] The natural frame of mind consequent to such circumstance moved Judge Frank to a delightful concurrence which throws much light upon the opinion of Judge Hand. The Labor Board had in that case reversed a finding made by one of its examiners. The Second Circuit was puzzled by the situation thus created but held that while the Board could not ignore an examiner's findings a reviewing court could not consider the Board's action in reversing the finding a factor in the court's own decision. The Supreme Court discussed the matter at length.[4] It held that an examiner's findings are not as unassailable as are a special master's under the Civil Rules;[5] that "The 'substantial evidence' standard is not modified in any way when the Board and its examiner

[2] National Labor Relations Bd. v. Universal Camera Corp., 190 F. 2d 429 (2d Cir. 1951).

[3] Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951).

[4] *Id.*, 340 U.S. at 492-497.

[5] A master's findings are reversible only if clearly erroneous. Fed. R. Civ. P. 53(e) (2).

disagree"; that evidence may be less substantial when an examiner has rejected it than it is when he adopts it; that his findings "are to be considered along with the consistency and inherent probability of testimony"; and that "The significance of his report, of course, depends largely on the importance of credibility in the particular case."

With the Supreme Court opinion on the point before us, we look at the case at bar. The examiner held that "management officials" of Easton "have been reluctant, evasive and evidenced a lack of candor". She specified instances on the part of the president and general manager (one man) and said "Other examples of evasiveness and lack of candor on the part of the general manager" of the proposed Easton station were considered, but I do not find what those examples were. Exception to the findings having been filed, the Commission considered them and failed to find the evasiveness and lack of candor the examiner found. The examples she cited, and which the court now discusses, are easy to consider upon the face of the record. They are not premised upon demeanor.

The first example is the program planning which we have discussed. I not only do not see evasiveness or lack of candor in it; the testimony seems fair, honest and complete to me. The second example is that the president of the company could not testify to the amount of the dividends declared in the year 1950. Here are the pertinent questions and answers, as they appear in the joint appendix before us:

"Q. Did the corporation declare dividends last year? A. Yes.

"Q. What was the size of the dividend?

"* * *

"* * * A. I don't know that without checking the record."

To me that testimony was not evasive and did not lack candor. Corporate officials testifying to a maze of figures, as this one was, frequently insist upon reference to the records for detailed figures as a matter of caution and accuracy. Indeed wise counsel forewarn witnesses against testifying by unrefreshed recollection on corporate statistics. If the object of the examination is the truth, the records are the best evidence. If the object is to test credibility, corporate statistics are not the field in which to do it. In the present case the records were available; indications are they were in the hearing room. I think the witness demonstrated commendable care.

The third example is that the president of the company testified to the published circulation figures of several newspapers which were circulated in the Easton area but upon cross examination it developed that the actual circulation of those papers in Easton itself was very small. The examiner said that by the direct testimony "he created the impression that the Easton Express has substantial competition from the Allentown and Bethlehem daily newspapers", whereas, in fact, as he showed on cross examination, this competition did not exist. The question asked this witness on

direct examination was prefaced by a remark by his counsel that in some prior hearing a question had been asked about the circulation of a Bethlehem, Pennsylvania, paper; the witness was asked if he had that figure. He replied that an association of newspapers published those figures, and he read the published figures for a number of newspapers into the record. His counsel then passed on to other matters. Opposing counsel picked up the subject and asked about the circulation figures in the Easton city zone. The witness read the figures from the same publication.

I note a few features of this episode. (1) No false statement is alleged to have been made. One counsel asked for some figures, and his opponent asked for more. All were truly given. (2) The nub of the present point is an impression on the part of the examiner that the witness attempted to create an impression. If it was an attempt by the witness it was not too smart an attempt. All the figures were apparently in the same publication, readily available to anybody. (3) The point was trivial. The Easton Press is the only paper published in Easton. How many out-of-town papers were sold there was of minimal importance. (4) Trial counsel generally will be startled to learn that, if they inquire about a subject and an opponent develops further facts about it, this court is of opinion that the failure of initial full development upon direct examination can, in the absence of any false statement, be used as a basis for reduc-

ing all the testimony on that side of the case to less than substantiality. I think so mighty a conclusion cannot properly be drawn from so tiny a premise.

So, when I examine the three examples given in support of the position that Easton's principal witnesses were reluctant, evasive, and lacked candor, which are instances easily checked on the written record, I find no substance whatever. As to other instances of evasion, etc., not identified by the examiner, I cannot consider them, because I do not know what they are. Neither does the court know.

My brethren say that the examiner's conclusions as to reluctance and evasion were based upon demeanor, bearing, delivery, etc., and in a footnote refer to the examiner's findings as to attitudes and impressions. This is a wide departure from the proper purpose and use of the demeanor test in respect to testimony as I understand it. The demeanor of a witness may be an indication whether he is or is not telling the truth. It is a reactor of credibility. But if a witness is telling the truth, his demeanor in telling it is no factor in its acceptability. The parade of witnesses is not a popularity contest. The truth need not fall trippingly from the lips; it may come haltingly, timorously, cautiously. But if it is the truth, the mannerisms of its delivery are no detraction. And so if a witness tells the truth, a hearing officer cannot say, "To be sure, he told the truth but I got an impression that he would have liked to deceive me, and so

I will not accept his statements." The examiner in the case at bar did no such thing as that. She found evasion and lack of candor in what the witness did, not in how he did it. She rejected his testimony because of the substance of it, not because of the demeanor of the witness in the delivery of it. For example, in respect to the newspaper circulation incident, she found evasion in the fact that the witness on direct examination read into the record the total circulation figures but not the Easton area circulation. She did not find evasion because of his manner of reading. There is no question as to the truth of the figures he read. Whether he was myopic, unnecessarily cautious or meticulous, stuttered or spluttered was no part of her consideration, as I understand her reasoning. She found evasion because he read some figures and did not read others. The same observations apply to the other item mentioned by my brethren, the network plans. The evasion found by the examiner was in the substance of the testimony. She simply did not believe that the Company had made no plans. If the witness had said it with the charm of a television commercial, she still would not have believed it. Demeanor was not the index of the evasion; the substance of what was said was evasive in the examiner's view. I think the examples of alleged evasiveness in this case are precisely the sort which an agency can itself evaluate upon the record.

The Commission itself found no evasiveness and reversed its examiner's conclusions. The Supreme

Court held in *Universal Camera, supra*, that the findings of the hearing examiner do not have to be clearly erroneous to be reversed by the agency. "The responsibility for decision", said the Court, "thus placed on the Board" is inconsistent with the clearly-erroneous requirement.[6]

This court reverses the Commission on this point because it finds no substantial preponderance in the evidence against the examiner's views. The court gets that rule, as I have pointed out, from Judge Hand's comment upon the Supreme Court opinion in *Universal Camera*. I am not sure what Judge Hand's statement means in the abstract, when read in the light of the Supreme Court's clear statement that an examiner's findings can be reversed by the agency for less than clear error. But I am sure that his statement does not deny the power of the agency in a case like the one before us. In the first place the lack of justification for the examiner's conclusions in the three instances she specified is as clear as a record can be. In the second place even the total of the three examples is no justification whatever for the blanket conclusion that there is no substantial evidence. The cited examples, even if accurately evaluated, are only small reeds; they are not footings for a heavy superstructure. I think my brethren are in flat conflict with the Supreme Court ruling when they reverse the Commission on these differences between the Commission and its hearing examiner.

Moreover the court seems to equate an agency's

[6] *Supra* note 3, 340 U.S. at 492.

power to reverse its own examiner's finding with a reviewing court's power to reverse the agency's finding. It cites cases dealing with a court's power. This is interesting because in one cited Second Circuit case[7] Judge Frank cites and quotes from another Second Circuit opinion,[8] in which the court differentiated between "testimonial inferences", based upon estimates of credibility, and "derivative inferences," inferred from the testimony. The court may disregard the latter, said Judge Frank, and added: "And we must disregard such a finding when the derivative inference either is not rational or has but a flimsy foundation in the tesimony."[9] The conclusions in dispute in the case at bar, as made by the trial examiner, were most truly "derivative inferences", and moreover, to my way of thinking, had but flimsy foundations in the testimony. They could, and should, have been disregarded by the Commission. Furthermore I do not think the power of the court to reverse the agency is as extensive as is the power of the agency to reverse its examiner. That is the plain teaching of the *Universal Camera* case and also of the Administrative Procedure Act, as I read them. And such is the reasonable rule, because the whole rationale of administrative procedure rests upon findings by the agency, the body empowered by Congress to make the adjudication. Of course, in

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[7] National Labor Relations Board v. Dinion Coil Co., 201 F. 2d 484 (2d Cir. 1952).

[8] American Tobacco Co. v. The Katingo Hadjipatera, 194 F. 2d 499 (2d Cir. 1951).

[9] *Id.* at 451.

a disputed finding which depends upon demeanor, or upon some other feature better estimated by the person who sees the witnesses, observes their gestures, delays, etc., and hears their intonations, inflections and emphases, that person is best able to resolve the dispute. But where findings are made from factual data, or factual statements, the responsibility for the action is upon the agency itself. In such instances it cannot be bound to make a finding which it does not believe to be accurate. In the case before us the alleged "evasiveness" was not a matter of demeanor but a matter of factual substance of testimony.

Third. The court entitles this part "Monopoly and concentration of communications media." The facts are important. There is now only one standard broadcast station in Easton; it is not owned by the present applicant. Allentown has three standard stations. In respect to standard stations, therefore, the question is whether Easton should have a *second* station, bringing competition to a present monopoly, or Allentown should have four. Of course many other considerations enter, all as pointed out in our opinion in the first appeal. For example, Easton has two FM stations, one of which is owned by appellee, while Allentown has one operating and one under-consideration FM station. It is agreed that so far as receivers are concerned the FM broadcasts are a minor consideration. The point here is that the "monopoly" feature is not a simple black-and-white problem.

In the next place the permissible amount of con-

centration of mass communication, involving broadcast stations and newspapers, is peculiarly a problem for the Commission. Here, indeed, is a regulatory problem. Ownership of a station by a newspaper can hardly be denounced *per se*. In the District of Columbia two of the four radio-television stations are owned by newspapers. In the instant case the Commission weighed many factors in this connection and produced a judgment on the point. I think the court should let it alone.

On the basis of the foregoing three considerations—(1) indefiniteness of program plans, (2) evasiveness of witnesses, and (3) concentration of communication media—the court concludes that there is no substantial evidence on the record as a whole to support the Commission's conclusion that the ability of Easton to serve its community is equal to the ability of Allentown to serve its community. I think, as I have indicated, that none of the three specifications has substance. I think, further, that the conclusion of the court does not follow from its specifications. Even if Easton's program plans were indefinite as to network affiliation, and its witnesses were evasive in the manner specified (network plans, unrefreshed recollection as to dividends, and the newspaper circulation matter), and the local newspaper would own one of the two standard radio stations, it does not follow that there is no substantial evidence of Easton's equal ability. There is ample evidence in the record on the point, as the fully documented findings readily show. The

court does not merely differ with the Commission upon the relative evaluation of the applicants' abilities. It does not merely say there is less evidence in support of Easton than in support of Allentown. It strikes relative evaluation entirely from the case. It says there is no substantial evidence—none—in favor of Easton. It might be proper (although I would not agree with it) for the court to say that in view of the three specifications it is of opinion that the evidence of the ability of Easton is less than the evidence of the ability of Allentown. But it could not reverse the Commission on that basis. It can reverse only if there is no substantial evidence, on the record as a whole, to support the Commission's conclusion. The court finds no such evidence. I think its conclusion to that effect is not supported even by the three specifications it makes. It seems to me that the court is merely substituting its judgment for the judgment of the Commission as to which of these two applicants should have the license. It has no power to do that.

I would affirm.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 11,897

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE, EASTON PUBLISHING COMPANY, INTERVENOR, WKAP, INC., INTERVENOR

APRIL TERM, 1954

No. 11,957

ALLENTOWN BROADCASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE, WKAP, INC., INTERVENOR

Appeals from an Order of the Federal Communications Commission

Before: Wilbur K. Miller, Prettyman, and Bazelon, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the transcript of the record from the Federal Communications Commission, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the Federal Communications Commission appealed from in Case No. 11,957 be, and it is hereby, reversed, and that said case be, and it is hereby, remanded to the said Federal Communications Commission for a redetermination in accordance with the opinion of this Court.

It is further ordered by the Court that the appeal in Case No. 11,897 be, and it is hereby, dismissed as premature.

Dated: August 19, 1954.

Per Circuit Judge Bazelon.

Separate dissenting opinion by Circuit Judge Prettyman.

United States Court of Appeals for the District of Columbia Circuit. Filed August 19, 1954. Joseph W. Stewart, Clerk.

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No. 451

In the Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

ALLENTOWN BROADCASTING CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 451

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

ALLENTOWN BROADCASTING CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 315–331) has not yet been reported. The decisions of the Commission (R. 156–219, 257–263) are not yet officially reported. They may be found at 8 Pike & Fischer, Radio Regulation 31, and 9 Pike & Fischer, Radio Regulation 887.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1954 (R. 331). The petition for a writ of certiorari was filed on Novem-

ber 16, 1954, and was granted on January 10, 1955 (R. 332). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. The Court of Appeals held that the Federal Communications Commission, in deciding between mutually exclusive applications for broadcast stations in different communities, pursuant to Section 307 (b) of the Communications Act of 1934, as amended, can determine that one community's need for a second station outweighs the needs of the other community which already has a multiplicity of local services, only if it has first found that both applicants are approximately equal in their ability to serve their respective communities. The first question is whether such a holding imposes an undue limitation upon the exercise of the administrative licensing powers of the Commission.

2. Whether, under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, the court below improperly substituted its judgment for that of the Commission on the inferences to be drawn from undisputed facts, largely by holding that the Commission's conclusions concerning the qualifications of a proposed licensee to operate a station in the public interest, when such conclusions differ from those of its hearing examiner, must be supported by a "very substantial preponderance" in the evidence.

STATUTE INVOLVED

Section 307 (b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 49 Stat. 1475, 47 U. S. C. 307 (b), provides as follows:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

This case involves the disposition by the Commission of two applications for construction permits for standard broadcast stations on the same frequency, one by Easton Publishing Company for Easton, Pennsylvania, and the other by Allentown Broadcasting Corporation for Allentown, Pennsylvania. The two applications are mutually exclusive because of the proximity of the two communities. Although neither proposed station would render broadcast service to the other community, the interference caused by either one to the other would be such as to preclude the grant of both applications (R. 180). In the decision here in issue, the Commission granted the application of Easton and denied that of Allentown

(R. 156–219).[1] On appeal by respondent, the court below, with Judge Prettyman dissenting, reversed the Commission's decision and remanded the case for redetermination by the Commission (R. 315–331).

PRIOR PROCEEDINGS—THE FIRST EASTON CASE

The Easton and Allentown applications were the subject of a full comparative hearing in proceedings which originally commenced in 1946. At that time, there were pending before the Commission, in addition to the two applications now involved, two other applications seeking facilities on the same frequency, one in Easton and the other in Allentown (R. 156). After a comparative hearing in which all four of the applicants participated, the Commission issued a decision granting the application of the present respondent for Allentown, and denying the other three applications (R. 157). Its decision was based upon the determination that the city of Allentown was in greater need of an additional broadcast facility than was the city of Easton, so that a grant to Allentown was required by Section 307 (b) of the Communications Act of 1934, as amended, 47 U. S. C. 307 (b), and that the

[1] Also before the reviewing court was a Memorandum Opinion and Order of the Commission denying Allentown's petition for rehearing of its decision to grant the Easton application (R. 257–263).

present respondent was the better qualified of the two Allentown applicants.

The Commission's decision, however, was reversed by the Court of Appeals for the District of Columbia Circuit on the ground that the Commission had not set forth the findings upon which it based the determination that Allentown had greater need of an additional service. The court remanded the case to the Commission for "findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need." *Easton Publishing Co.* v. *Federal Communications Commission,* 175 F. 2d 344, 351.

Upon remand, the Commission ordered a further hearing on the ground that the existing record was inadequate. This order was affirmed in *Easton Publishing Co.* v. *Federal Communications Commission,* 185 F. 2d 987. The decision of the Commission which is the subject of the instant case was the result of that further hearing.

THE EXAMINER'S DECISION

The further hearing was held before an Examiner of the Commission in March, May, and June, 1951. Only the two applicants now involved participated at this further hearing.[2] Evidence

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[2] The second Allentown applicant failed to participate in the first appeal and did not prosecute its application thereafter. The second Easton applicant was a party to the first

was introduced concerning the proposals of the applicants as then formulated, and the needs of the two communities in the light of the broadcast service then available to those communities. On June 11, 1952, the Examiner issued an Initial Decision proposing to grant Allentown's application and to deny that of Easton (R. 53–147).

In reaching this conclusion favoring Allentown, the Examiner found that both applicants were "legally, technically, financially, and otherwise qualified" for the licenses they sought (R. 124, 126). She made detailed findings as to the number of stations operating in each community and the nature of the service provided by them (R. 134–137, 140–141). She noted that Easton was receiving local service from only one AM station, while Allentown had three; that Easton's population was about 34,000 while Allentown's was about 106,000, with the latter growing at a faster rate; that Allentown had slightly more persons per station, but that use of such a ratio would be "an unrealistic approach" to the problem (R. 126–127, 145–146). In her statement of possible criteria by which to judge the relative needs of the two communities, she found none of those she mentioned significant (R. 145–146). She concluded, however, that the "over-all evidence in this record clearly shows a greater need

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appeal, but did not participate in the second Commission hearing (R. 156).

for additional radio service in Allentown than in Easton" (R. 146).

Though the Examiner stated no basis for the foregoing conclusion, she discussed in some detail the abilities of the two applicants (R. 131–132, 133, 135–139, 140–142). She found the experience, and integration of ownership and management, of Allentown to be slightly greater than those of Easton, but that the difference was "not of compelling degree" (R. 131–132), and that both applicants were qualified to be broadcast licensees (R. 132). She then compared their qualifications "as shown by past deeds as well as future plans" (R. 132). She thought that the preponderance of evidence in the record established that the attitude of Easton was that its radio station would be a complement to its newspaper activities (R. 133). Although she found that the three stations in Allentown (excluding that of respondent) and the lone station in Easton provided a general, balanced program service for each community (R. 135–137, 140–141), and that each applicant would not only broadcast some programs not then available from the existing stations, but also promote local talent and provide time for local civic, educational and governmental organizations (R. 136–139, 141–142), she gave more credit to the program proposals of Allentown than to those of Easton.

The Examiner further pointed out, and gave weight to the fact, that the Allentown proposals

were more than just proposals, since this applicant's station had been in operation since the first Commission decision,[3] though she also recognized that on remand from the Court of Appeals it was necessary to treat Allentown as "merely an applicant among other applicants entitled to no additional rights or privileges" (R. 139–140).

On the other hand, with respect to the program proposals of Easton, the Examiner concluded that the record did not disclose with the required certainty the program service which would be rendered by Easton if it were granted a license (R. 142–144). This conclusion was based upon what she found to be uncertainty in the testimony of Easton witnesses as to whether Easton would or would not affiliate with a national network if it were to receive a license.[4]

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[3] The Allentown applicant's station has been in operation ever since the Commission's first decision in its favor despite the subsequent reversal of that decision by the court below. Its operation continues under a stay granted by the court below of the Commission's order following its grant of Easton's application which would have ended Allentown's operating authority and empowered Easton to commence operations. As the Commission made clear in authorizing Allentown's temporary operations, this authority in no way enhances its rights or prejudices Easton in the determination of which application should ultimately be granted (R. 159–160; see also R. 139).

[4] In addition, she pointed to the fact that Easton had not been able to program its FM station in quite as elaborate a manner as it had proposed at the time it was contemplating joint AM–FM operations (R. 137). She also contrasted the fact that most of the types of programs proposed to be broadcast by Easton were broadcast over the existing Easton sta-

The Examiner further concluded that two of Easton's principal witnesses had not made the frank, candid, and honest disclosures which the Commission has a right to expect from applicants (R. 144). This conclusion was based on testimony with respect to the possible affiliation by Easton with a national network, the circulation of out-of-town newspapers in Easton, and the size of the dividend paid by the Easton applicant in 1950. Although the Examiner found this lack of candor to have significant import, she did not state what effect it had on her consideration of the competing applications (R. 145).

THE COMMISSION'S DECISION

Easton and Commission counsel filed exceptions to the Initial Decision, and Allentown filed a reply to those exceptions. Oral argument on the exceptions was heard by the Commission *en banc,* and on July 2, 1953, the Commission released its Final Decision in which, disagreeing with its Examiner, it granted Easton's application and denied Allentown's (R. 156–219). The Commission, as had the Examiner, made detailed findings of fact as to the characteristics of the communities involved (R. 162–164), the applicants (R. 165–180), the engineering proposals of the applicants (R. 180–187), the existing

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tion (R. 135–136) with the fact that a number of the types of programs carried by Allentown were not broadcast simultaneously over other Allentown stations (R. 141).

radio services in Easton and Allentown (R. 188–196), and the proposed program service of the applicants (R. 196–203).

In its Conclusions, the Commission first reviewed the evidence relating to the qualifications of each of the applicants (R. 203–209), and decided, as had the Examiner, that each was legally, technically and otherwise qualified to become the licensee of the station it proposed (R. 204–209). In reaching this conclusion, the Commission carefully considered the findings and conclusions of the Examiner with respect to the evasiveness and lack of candor of Easton's witnesses (R. 204–206) even though the Examiner had not found this to be a disqualifying factor. The Examiner had specified with great particularity the bases for her views on this subject, and the Commission concluded that her findings were based on her evaluation of the testimony of record rather than on her judgment as to the credibility of the witnesses (R. 205).[5] The Com-

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[5] In this connection the Commission stated (R. 205): "These findings were based primarily on what was thought to be conflicts in the testimony of such witnesses, the eliciting by cross-examination of certain information which the Examiner considered should have been made clear during the witness' direct testimony, and a professed lack of knowledge of a matter which the Examiner considered the witness reasonably should have known. Because of the seriousness of the matter and the fact that the Examiner's findings were primarily based on her evaluation of testimony by one witness rather than on her judgment as to the creditability of different witnesses who make contradictory statements, we feel that

mission made its own evaluation of the testimony on which the Examiner had relied and concluded on the basis of that testimony and of the record as a whole, including the Examiner's views set forth in the Initial Decision, that there was no persuasive indication of reluctance, evasiveness or lack of candor on the part of Easton's witnesses (R. 205–206). The Commission also considered the relationship between Easton's newspaper and proposed radio operation and concluded that the two media would be conducted as substantially separate operations (R. 206–207).

The Commission held that the principal issue in the proceeding was "which of the two communities involved has the greater need for additional standard broadcast service" within the meaning of Section 307 (b) of the Communications Act (R. 209). It pointed out that each community received radio service from stations located in other cities, and that in addition each community received local service, Allentown from the three stations located there, and Easton from the single station licensed in that city (R. 209–210). The Commission concluded that, in terms of the types of programs proposed to be broadcast by each applicant, each community had a need sufficient to justify the additional service and that on this basis there was little room for choice between the

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we are obligated to independently evaluate the evidence in question, giving due weight to the opinion of the Examiner and the contentions of the parties."

two communities (R. 210–211). The decisive factor in determining which community had the greater need for a new station was held to be a lack in Easton of a choice between locally originated standard broadcast programs (R. 211–212). The Commission pointed out that the importance of such a choice of locally originated programs as an element establishing a greater need under Section 307 (b) had previously been recognized by the Commission and the court below.[6]

The Commission found that the Easton applicant, which was the only applicant in the proceeding which would serve Easton, was qualified to meet Easton's need for a choice of locally originating programs (R. 214–215). In reaching this conclusion, the Commission rejected the Examiner's conclusion that the record did not disclose with the required certainty the program service which Easton would render, because of a failure to indicate which local programs would be dropped in the event that a network affiliation was later obtained.

Allentown thereupon filed a petition for rehearing (R. 228–255), arguing *inter alia* that the Commission had failed to make findings upon some twelve criteria on which a comparison of the qualifications of the applicants should have been based (R. 239–242). In its opinion denying this

[6] *Northwestern Ohio Broadcasting Corp.*, 3 Pike & Fischer, Radio Regulation 1945, affirmed, *Sky Way Broadcasting Corp.* v. *Federal Communications Commission*, 176 F. 2d 951.

petition (R. 257–263), the Commission rejected Allentown's contention that a full comparison of the relative qualifications of the applicants should have been made, once again explaining the grounds upon which it considered that decision must rest in a case such as this. It said (R. 258–259):

> This is not a case in which the Commission is called upon to consider the comparative qualifications of two or more applicants proposing to serve the same community; instead, it is a case in which one of the applicants proposes to serve Easton, Pennsylvania, and the other Allentown, Pennsylvania, and neither would provide service to the other community. Under such circumstances, the primary determination to be made is that required by Section 307 (b) of the Communications Act; namely, how best to distribute licenses among the several states and communities as "to provide a fair, efficient and equitable distribution of radio service to each of the same." In the present case, having determined that Easton, Pennsylvania with only one standard broadcast station was in substantially greater need of a second local facility than the Allentown community which already has four standard broadcast stations, we went on to consider, in accordance with the mandate of the Court of Appeals in the first Easton decision, which of the two applicants would best serve the needs of Easton,

> Pennsylvania and found that the Easton Publishing Company was such applicant. But we also recognized that in spite of the demonstrable greater need of Easton than Allentown for a new standard broadcast facility, the public interest would not necessarily be served by granting the only application for that city if the record were to have demonstrated that the Easton applicant was unable to provide adequately for the demonstrated needs of the Easton community. We accordingly went on in our decision to point out the reasons for our belief that the Easton Publishing Company station would in fact serve the needs and interests of the Easton community for a choice between locally originated programs which had led us in the first instance to favor a grant to Easton rather than Allentown.

THE DECISION OF THE COURT OF APPEALS

Reversing the Commission, the Court of Appeals held that one of the "essential underlying" findings necessary for the application of the "choice of local service" principle, upon which the Commission's decision was based, was that the respective applicants possess approximately equivalent ability to serve the needs of their respective communities (R. 317–318). The court interpreted the Commission's decision as having been based upon such a finding, and held that the finding lacked adequate support in the record as a whole.

This latter holding, in turn, centered on the Commission's disagreement with its Examiner's findings concerning (1) the program plans of the Easton applicant, (2) the asserted evasiveness and lack of candor of two Easton witnesses, and (3) Easton's ownership and use of other communications media. The Commission's findings contrary to those of the Examiner could only be sustained, the court concluded, by a "very substantial preponderance in the testimony as recorded" (R. 319–320).

Judge Prettyman, dissenting, asserted that the court had exceeded its function as a reviewing court and improperly substituted its views for those of the Commission in determining whether the public interest would best be served by a grant of the Easton or Allentown application. In his view, that policy determination was one for the Commission to make, and the function of the reviewing court was merely to decide whether the policy was reasonable and supported by the findings and the evidence (R. 324). He characterized the Commission's findings as "full, understandable, and abundant in references to the evidence" and more than adequate to support the Commission's conclusions (R. 323). With respect to the alleged evasiveness of Easton's witnesses, Judge Prettyman held that the court had engaged in a "wide departure from the proper purpose and use of the demeanor test in respect to testimony" and had misapplied the decision of this Court in

Universal Camera Corp. v. *National Labor Relations Board,* 340 U. S. 474 (R. 325–330).

SUMMARY OF ARGUMENT

I

Section 307 (b) of the Communications Act directs the Commission in granting licenses for broadcasting stations to "provide a fair, efficient, and equitable distribution of radio service" to the various states and communities. The court below did not question, and has in fact approved, the Commission's long-established policy of making the need for service its overriding concern where mutually exclusive applications are filed for stations to serve different communities. The court rejected, however, the Commission's determination that the city of Easton, because it had only one local station and therefore lacked a "choice of local service," had greater need for a second local station than Allentown had for a fourth. The court held that the "choice of local service" principle may be applied only where (1) the respective abilities of the competing applicants are "about equal" and (2) there is, apart from the problem of choice of local service, "approximately equivalent community need" (R. 317). Neither of these qualifications is supportable.

In laying down these criteria governing licensing of radio stations, the court entered into a domain of policy considerations rather than is-

sues of law. Congress declared a broad mandate of licensing policy in Section 307 (b), which the Commission properly implemented by its "choice of local service" rule. That rule, as stated by the Commission and applied by it in the present case, represents a reasonable and appropriate exercise of the licensing power granted it by Congress. The court below overstepped its function of reviewing for errors of law by attempting to substitute its own formulation of the "choice of local service" rule for that adopted by the Commission.

A. The Commission found that the city of Easton had the greater need for an additional station. It also found, as had its Examiner—and the court below does not appear to have disagreed—that the Easton applicant alone was qualified to serve this need. The Commission properly ended its inquiry here. There was no reason to attempt to compare the ability of the Easton applicant to serve Easton with the ability of the Allentown applicant to serve Allentown once it was determined that Easton's need was greater, that the new station should therefore be established at Easton rather than Allentown, and that only the Easton applicant proposed to, and was qualified to, operate a station in Easton. Before the instant decision, the court below had recognized that the Commission had ample authority so to treat such competing applications for stations in different communities.

Radio Cincinnati v. *Federal Communications Commission*, 177 F. 2d 92. Its contrary conclusion here misconstrues the mandate of Section 307 (b).

B. The "choice of local service" principle is an obviously sound factor in determining need, and accords with the policy of Section 307 (b) as expressed in both its language and its legislative history. There is no basis for the view of the court below that this principle may be applied only when the need of communities competing for service is "approximately equivalent" in all other respects. The provision of outlets for local self-expression is properly deemed by the Commission to be a major need in itself, independently significant, appropriately weighed along with other elements of need. Its importance in a particular case, which is for the Commission to weigh, turns, of course, upon the facts of the case. But there is no reason for—and substantial reason against—lowering it to the position of insignificance it is given, apparently as a matter of law, by the decision below. The court below, in effect, transformed what is essentially a question of administrative judgment for the Commission into one of law, for a reviewing court finally to determine.

II

A. The Examiner found that in three instances witnesses for the Easton applicant had been eva-

sive and lacking in candor. The Commission examined these findings with care. It found from the Examiner's decision that they were based on analysis of the content of the testimony in question rather than on the demeanor of the witnesses. It concluded (R. 205) from its own analysis of these bits of testimony and the record as a whole that there was "no persuasive indication of reluctance, evasiveness or lack of candor on the part of the Easton witnesses, and that, to the contrary, the testimony of such witnesses, properly viewed, gives an overall appearance of consistency, candor, and straightforwardness."

The court below, holding that the Examiner's finding of lack of candor was not "derived solely from evidence preserved in the printed record" (R. 319, fn. 21), concluded that the Commission could not disagree with its Examiner "without a very substantial preponderance in the testimony as recorded" (R. 319–320). In this, the court misconceived the nature of the finding in question and of this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474.

1. There is no doubt that the trier of facts who sees and hears the witnesses is uniquely able to draw inferences from "demeanor evidence" and that such "testimonial inferences" are entitled to great weight. It is necessary to distinguish inferences drawn from analysis of the testimony

itself—so-called "derivative inferences"—where truth or falsity of the statements is not in issue, but an effort is made to determine motive or purpose from what is said, when it is said, and the kind of questioning required to elicit the information. The latter kind of inference is involved here.

The Examiner's decision makes clear that her inference of "lack of candor" was not based on the bearing or demeanor of the witnesses but on what they said and left unsaid. Thus when a witness could not recall a dividend figure from memory, but said he would have to consult records to supply it, the Examiner questioned his candor because she thought he *must have* had the figure in his head, not because of his manner of stating the contrary. The rest of her discussion on this issue is similar. Indeed, she explicitly refers at one point to her "study of this record" (R. 144) as the basis for finding a lack of candor.

The Commission, as was its duty, made its own "study of this record," including the brief portions which give rise to the present issue. It reached the carefully reasoned conclusion that the characterization of Easton's witnesses as evasive was wholly unwarranted. Particularly with respect to findings of the type in question, the ruling below that the Commission could be sustained only by "a very substantial preponderance in the testimony" is erroneous.

2. This Court's opinion in *Universal Camera* expressly stated that the "responsibility for decision * * * placed upon the [agency] is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous.'" 340 U. S. at 492. The rule thus rejected is in effect adopted by the decision below. The result of the test announced in this case is to divert attention from the proper question on review—whether the *agency's* decision is supported by substantial evidence on the record as a whole—to the question whether there was evidence requiring the court to "affirm" the examiner. To be sure, the formula by which the standard of review is stated is not in itself the most significant objective in this area which must by its nature be to a considerable extent "unruly" (see *Universal Camera, supra,* at 493). But the error we assert in the rule announced below serves at least to state the point of importance here—that, judged by a proper standard of review, the Commission's disputed findings should have been affirmed.

3. We believe that, as Judge Prettyman's dissent demonstrates, these findings were more reasonable than those of the Examiner which the Commission rejected. At worst, the findings of the Examiner and the Commission presented a "choice between two fairly conflicting views" in which those of the Commission should have prevailed. *Universal Camera, supra,* at 488.

B.1. The Commission found no basis for the Examiner's finding that, because the Easton applicant could not know whether it would obtain a network affiliation in the future and what local programs would be displaced if such an affiliation were obtained, its program plans lacked the requisite certainty. There was no problem here of disputed evidence. The Commission's judgment is the very type of expert appraisal for which the Commission exists and which it must make in case after case. In substituting its contrary judgment, the court below erred.

2. The Commission noted that the Easton applicant owned Easton's only newspaper and television station and one of Easton's two FM stations. The Commission also found that this applicant had in the past failed to carry program logs of Easton's one AM radio station, but had commenced carrying them in 1948. Indicating its disapproval of this latter practice, the Commission found that these facts as to ownership of other media did not disqualify the applicant as a licensee.

Neither the Examiner nor the court below disagreed with this conclusion. The court thought, however, that the Commission, like the Examiner, should have appraised these facts in "weighing the relative abilities of the competing applicants." If, as we argue in Point I, no such comparison was necessary or proper, the problem here disappears.

The Commission's decision actually brings competition in AM broadcasting to Easton, where a single AM station owned by another licensee has heretofore had a monopoly. Accordingly, it cannot be said that the Commission's judgment on this matter was unreasonable and erroneous as a matter of law.

ARGUMENT

I. THE COMMISSION CORRECTLY DECIDED THAT THE NEED OF EASTON FOR A SECOND LOCAL STATION WAS GREATER THAN THE NEED OF ALLENTOWN FOR A FOURTH, AND THAT THE EASTON APPLICANT, THE ONLY ONE SEEKING AND QUALIFIED TO SERVE EASTON'S NEED, SHOULD ACCORDINGLY BE LICENSED

Section 307 (b) of the Communications Act (*supra*, p. 3) directs the Federal Communications Commission, in considering applications for licenses, modifications, or renewals, to

> make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

The plain and overriding objective of this mandate is that the Commission shall supply equitably the *needs* of the various states and communities for radio service. Where, as in this case, there are presented mutually exclusive license applications, and where the applicants propose to serve different communities, the Com-

mission's primary duty and authority under the statute, assuming both applicants are qualified to perform the respective services for which they seek a license, is to determine which of the communities has the greater need.

Accordingly, in reversing the Commission's earlier decision in this case for failure to elucidate the reasons for its determination, the court below had remanded with instructions that the Commission determine and make proper findings as to "*the comparative needs of the two communities* for new radio service and the relative abilities of the two applicants to serve *the greater need.*" *Easton Publishing Co.* v. *Federal Communications Commission,* 175 F. 2d 344, 351 (emphasis added). Pursuant to this mandate, the Commission (and its Examiner) made undisputed findings that (1) only one of the two applications remaining before it could be granted, because a grant of both would result in "mutually prohibitive interference" (R. 127, 180, 204); (2) that the Easton applicant could serve only Easton, and the Allentown applicant only Allentown (R. 128, 130, 180, 214); (3) that the city of Easton was receiving local service from only one standard (AM) broadcasting station, while Allentown was receiving such service from three stations in Allentown, plus a substantial amount from a fourth station in Bethlehem (R. 69, 188, 191); and (4) that each applicant was qualified to pro-

vide the service (to Easton and Allentown, respectively) for which it sought a license (R. 132, 204, 209).[7]

The Commission went on to find (R. 211) that, separately considered, "each community might well be found to have a need sufficient to justify an additional service of the type proposed by the applicants," and that there was in most respects "little room for choice between the two communities." The Commission further found, however, that there was "one decisive factor" favoring Easton—the fact that this city was receiving locally originated programs, providing opportunities for local self-expression, from only one station, while Allentown received such service from three stations. And the Commission concluded that the need of Easton for a second local service was greater than the need of Allentown for a fourth.

Reversing this decision, the court below stated as follows the crux of its disagreement with the Commission (R. 317–318):

> This "choice of local service" principle is a gloss on § 307 (b) of the Communications Act of 1934, *supra*. It was first applied by the Commission in *Northwestern Ohio Broadcasting Corp.*, upon the crucial findings that the choice between the two com-

[7] Although, as shown by the portions of the record to which we refer, the Examiner as well as the Commission found both applicants qualified, the Examiner made findings, rejected by the Commission, which cast doubt upon Easton's qualifications. We treat this aspect of the case in Point II, *infra*.

> munities was "indeed a difficult one" and that both applicants propose[d] to render meritorious program services designed to meet the needs of the respective communities * * *." Since we affirmed on appeal because there was "no error in the record," our approval of the "choice of local service" principle was limited to its application in circumstances of otherwise approximately equivalent community need and applicant ability to serve such need. Although in the present case the Commission purported to find such equivalence, we think *there is no substantial evidence in the record as a whole—including the Hearing Examiner's Initial Decision—to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal.* Hence, we hold the Commission's error is fatal to the order under review and requires that the case be remanded for reconsideration by the Commission. [Emphasis added.]

Thus, the Court of Appeals held crucial the Commission's failure to find that the Easton applicant's ability *to serve Easton* "was about equal" to the ability of the Allentown applicant *to serve Allentown.* The Commission had found it unnecessary to make any such comparison, since Easton's need had been found greater than Allentown's, and since only the Easton applicant proposed "to originate programs in and for the Easton community and to provide a primary service to that

community" (R. 214; and see R. 258–259). Nevertheless, the court below found the absence of such a comparison a fatal defect. It also held that the Commission's "choice of local service" principle could apply only "in circumstances of otherwise approximately equivalent community need" (R. 317), though it did not disagree with the Commission's finding of such equivalence in this case.

We submit that the Court of Appeals majority erred in both of the policy judgments it undertook to substitute for those of the Commission. We urge, of course, that such judgments are for the Commission rather than the courts. Apart from this, we believe the requirement of Section 307 (b) of the Act was correctly met by the Commission's decision that the City of Easton, because it had the greater need, should be awarded the new station. And we note the striking contrast between the decision of the court below in this case and its earlier resolution of the same type of problem in *Radio Cincinnati* v. *Federal Communications Commission*, 177 F. 2d 92.

A. THE COMMISSION WAS NOT REQUIRED BY THE ACT, AS A NECESSARY CONDITION TO ISSUANCE OF A LICENSE, TO ATTEMPT TO COMPARE THE ABILITY OF THE EASTON APPLICANT TO SERVE EASTON WITH THE ABILITY OF THE ALLENTOWN APPLICANT TO SERVE ALLENTOWN

The overriding standard for the grant of a broadcast license, set forth in Section 307 (a), 47 U. S. C. 307 (a), of the Communications Act, is that

it shall be in the public interest, convenience, and necessity. In the main, the specific content of this general standard has been supplied through the years by the exercise of Commission judgment; the role of judicial review, as this Court has made clear, is simply to correct errors of law, not to substitute new judgments of policy. *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134. Congress has left the development of criteria for the grant of license applications to the Commission with the single major exception[8] that it has specifically required in Section 307 (b) that the Commission arrive at a fair, equitable, and efficient distribution of radio services among the several states and between different communities therein. This section is the only one which contains a specific guide governing the Commission in its disposition of applications for radio licenses.

There is no doubt—and the court below suggested none—that the purpose and effect of Section 307 (b) is to require that in any proceeding where the Commission is called upon to grant a license to one of several qualified applicants seeking mutually exclusive licenses to serve different communities or areas, its choice must be governed by the command "to provide a fair, efficient, and

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[8] Section 310 (a) of the Act, 47 U. S. C. 310 (a), prohibits the grant of radio licenses to aliens.

equitable distribution of radio service" among the states and communities. Buttressing the inevitable conclusion from the language of the statute, its legislative history emphasizes the objective of satisfying equitably competing needs for radio broadcasting service.[9]

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[9] Section 9 of the Radio Act of 1927 (44 Stat. 1166) contained language virtually identical with that of the present Section 307 (b). The language was amended in 1928 by the so-called Davis Amendment (45 Stat. 373), which required that licenses for stations be assigned in strict accordance with the population of the five zones into which the United States was divided in another section of the Act and to communities within each zone according to population. (See p. 42, *infra.*) The Davis Amendment was written into Section 307 when the Communications Act was enacted, with an additional proviso exempting licenses for stations of 100 watts power or less from the requirements of the section if the grant of such licenses would serve the public interest and if such stations would not interfere with other stations' licenses under the section (48 Stat. 1084). In considering applications for licenses for stations of 100 watts power or less the Commission applied the spirit of the remainder of the section, and granted such applications "where interference would not result and when the need [for such stations] has been established." Third Annual Report of the Federal Communications Commission (1938), p. 28.

The present language of Section 307 (b) was enacted in 1936 (49 Stat. 1475). In adopting this last amendment, Congress made it plain that it was attempting more effectively to meet the needs for radio services of the various communities and sections of the country. It noted that under the Davis Amendment the various sections of the country had not been "adequately supplied" with radio services and that its policy to achieve an equitable distribution of radio facilities had been "very difficult of effectuating." S. Rep. No. 1588, 74th Cong., 2d Sess., on S. 2243, pp. 2–3; H. R. Rep. No. 2589, 74th Cong., 2d Sess., on S. 2243, p. 3. See 80 Cong. Rec. 6032.

The Commission has followed the statute's requirement. When confronted with competing applicants proposing to serve different communities, the Commission, after ascertaining whether the applicants are qualified to be licensees, customarily determines which of the communities or areas for which service is proposed is in greater need of such service. *E. g., Northwestern Ohio Broadcasting Corp.*, 3 Pike & Fischer, Radio Regulation 1945, affirmed, 176 F. 2d 951 (C. A. D. C.); *Metropolitan Broadcasting Co.*, 5 Pike & Fischer, Radio Regulation 532; *Huntington Broadcasting Co.*, 5 Pike & Fisher, Radio Regulation 721.[10] This approach to the problem has received the express approval of the court below (which under Section 402 (b) of the Act is the only court having jurisdiction of appeals from Commission hearing orders). *Radio Cincinnati* v. *Federal Communications Commission*, 177 F. 2d 92; *Huntington Broadcasting Co.* v. *Federal Communications Commission*, 192 F. 2d 33. And, as noted above, that court in its first decision in the instant

[10] Although in the *Huntington* case the Commission did not base its choice on relative community need, this was only because the Commission concluded that the record did not show that either community had a need greater than the other. However, this case sets forth clearly the type of analysis made by the Commission where Section 307 (b) must be considered, for it was only after concluding that no choice could be made under Section 307 (b) that the Commission made a full comparison of the applicants' qualifications to determine which application should be granted.

proceedings held that this procedure should be followed here, and accordingly remanded the case to the Commission for "findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need." *Easton Publishing Co.* v. *Federal Communications Commission*, 175 F. 2d 344, 351.[11]

The Commission correctly followed the requirements of Section 307 (b) when, having determined

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[11] Judge Prettyman, who dissented from the decision under review here, wrote the earlier opinion for himself and two judges other than those constituting the majority of the present panel. A word of explanation may be appropriate to clarify the requirement on the earlier remand that the Commission determine not only "the comparative needs of the two communities," but also "the relative abilities of the applicants to serve the greater need." It is to be noted, first of all, that there were originally four applicants in this proceeding, two from Easton and two from Allentown. At that stage, therefore, whichever community was found to have the greater need, there appeared to be at least two applicants seeking to supply the need. In addition, the court found in the earlier case that it could not tell why, "if Allentown's need was greater, * * * [the Commission] concluded that the intervenor [the Allentown applicant] would supply that need to a greater extent than would the appellant [the Easton applicant]." 175 F. 2d at 349. In other words, it was not made clear to the court in the earlier appeal that only the Easton applicant proposed to serve Easton's need and only the Allentown applicant proposed to serve Allentown's. This point is perfectly clear now, however. *Supra*, pp. 3, 12, 24. It demonstrates the consistency of Judge Prettyman's opinions on each appeal and the error of respondent's assertion (Br. in Opp. 5, 6) that the Commission attempted to ignore the earlier mandate.

that Easton's need for service was greater than Allentown's and that only the Easton applicant proposed and was qualified to serve this "greater need," it awarded the license to this applicant. In its Memorandum Opinion and Order denying rehearing, the Commission answered in detail Allentown's complaint that the Commission had failed to compare the *relative abilities* of the competing applicants to serve their respective communities (R. 258–259). The Commission pointed out the inherent difference between a proceeding in which two or more applicants are seeking to serve the same community, and one like the instant case, in which each applicant proposes to serve a different community and neither would provide service to the other. In the former situation, the Commission observed, a comparison of the sort suggested by Allentown would be appropriate. But where different communities are involved, the Commission explained, the "primary determination" to be made is the one required by Section 307 (b) of the Communications Act—how to distribute licenses so as best to achieve a fair and equitable distribution of service among the *communities* involved.

The Commission went on to explain (R. 259) that its determination that Easton, with only one station, was in substantially greater

need of a second facility than Allentown was of a fourth, had by no means been the end of its consideration. Instead, it had gone on to determine that the Easton applicant was the only one of the two competitors who could serve "the greater need." And it had recognized, of course, that "the public interest would not necessarily be served by granting the only application for that city [Easton] if the record were to have demonstrated that the Easton applicant was unable to provide adequately for the demonstrated needs of the Easton community." So its decision had necessarily included a determination (R. 214) that the Easton applicant was fully capable of serving the need of the Easton community for the choice of local programming which had led the Commission to favor Easton over Allentown in the first instance.

The reversal of this decision by the court below proceeds, in our view, in two erroneous steps. The court found (R. 317–318) an absence of substantial evidence "to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal." As we have emphasized, the Commission explicitly eschewed any effort to make such a finding. But the point of obviously greater importance now is the holding of the court that a finding of this kind is "essential." It is this holding which constitutes the court's basic error.

If the mandate of Section 307 (b) is to be enforced, the relative abilities of the applicants to serve "their respective communities" cannot affect the grant of the license once it is determined that one community has the greater need and that only one applicant is qualified to serve that need. We put to one side in this assertion the serious question whether any meaningful comparison could normally be made between the ability of one applicant to serve the needs of City *A* and the ability of another applicant to serve the different needs of City *B*. Assuming the feasibility of such a comparison, the grant of a license to an applicant "better qualified" to serve the community which has the lesser need for the service could only result in an inequitable distribution of radio facilities, contrary to the express mandate given the Commission by Congress. The allocation of radio facilities under such a standard would not be governed by principles of fairness, efficiency, and equity to the communities, but by the relative excellence or mediocrity in some abstract sense of the service proposed by the competing applicants. Applicants for facilities in larger cities with multiple existing services can frequently be expected to present more elaborate proposals than competing applicants for smaller communities where financial and talent resources may be more limited. Thus, under the test deemed controlling by the court below, an impressive ability to serve a modest need of one city

might outweigh a merely sufficient ability to serve a more pressing need of another city. But Congress left no room—it certainly imposed no requirement of law, enforceable by a reviewing court—for speculation along such lines. It directed the Commission to give priority to the applicant qualified to supply the need of the under-served community.

Accordingly, the Commission properly held that the first determination it was required to make was which community had the greater need for an additional station. Once the greater community need was ascertained, the relative abilities of the applicants could have been material only insofar as they related to the serving of that need. Having found that the 35,000 people of Easton had a greater need for a second station providing an outlet for local self-expression than the need of Allentown's 106,000 people for a fourth station, the Commission carefully considered the qualifications of the Easton applicant, and the service it proposed to render, to determine whether it would fulfill Easton's need. This inquiry could not logically involve any comparison of the qualifications of the Easton and Allentown applicants, for it was clear and undisputed that the Allentown applicant did not propose to and could not serve Easton's needs.[12] The in-

[12] In some situations it is possible that applicants for stations in two communities not far removed from one another would each render local service to both communities (com-

quiry was properly ended with the finding—made by the Examiner as well as the Commission, and apparently accepted by the court below (but see pp. 47 *et seq.*, *infra*)—that the Easton applicant was in fact qualified to serve the need of its community for a choice between locally originated programs.[13]

In an earlier decision, *Radio Cincinnati* v. *Federal Communications Commission*, 177 F. 2d

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pare, in this case, the service rendered by a Bethlehem station to Allentown). It might happen in such a case that the greater need of Community A might be better supplied by a proposed station in Community B. In such a situation, there would of course be an occasion for a significant comparison between the applicants, but in terms of their ability to serve a single—the greater—need. Compare fn. 11, *supra*, p. 31.

[13] The Commission concluded (R. 214):

"Since only the Easton Publishing Company proposes to originate programs in and for the Easton community and to provide a primary service to that community, we think it obvious that the proposal of the Easton Publishing Company will more adequately meet the needs of the Easton community than will the proposal of the Allentown Broadcasting Company. The Easton applicant proposes to devote approximately 25% of its total broadcast time to live programs of local origin and, as previously noted, will provide a well-rounded program service including religious, agricultural, educational, news, discussion, and talk programs. We believe that these proposals for varied types of programs with a substantial amount of programming to be of local origin will, if carried into effect, result in a program service designed to meet the local needs and interests of the Easton community, and especially the need for a choice between locally originated programs. We are convinced, therefore, that a grant of the Easton application will be in the public interest."

92, contrary to its holding in the instant case, the court below approved precisely the result for which we contend here. The opinion merits quotation at some length (177 F. 2d at 94):

> It should be noted at the outset that this case does *not* involve the problem of choosing which of two competing applicants is the better qualified to serve the public interest. The problem of which, as between WKRC and WJIM, of the two broadcast companies has the better staff or the better financial resources or the better programming never required decision by the Commission in this case. Rather, it is conceded by all in this case that both WKRC and WJIM were and are fully qualified to perform the services which they proposed to perform in their respective applications and that their equipment, with the exception of directive antenna, would comply with the Commission's Standards of Good Engineering Practice. *The problem confronting the Commission in reaching the decision from which this appeal was taken was basically one of proper distribution and allocation of facilities as required in the public interest.* We believe that the Commission achieved a completely correct solution of the problem in this case as will be seen below.
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> The ultimate issue resolved by the Commission's decisions from which this appeal was taken was basically a geographical

> one, namely, whether public need for standard broadcast facilities would be better satisfied by a grant to the Lansing station or to the Cincinnati station. That the resolution of this problem in favor of WJIM was entirely reasonable and fair as well as legally sound is forcefully demonstrated by the * * * facts which lie beyond dispute upon the record in this case. * * * [All italics except first added.]

B. THE DESIRABILITY OF A "CHOICE OF LOCAL SERVICE" IS PROPERLY DEEMED AN INDEPENDENTLY SIGNIFICANT FACTOR IN DETERMINING A COMMUNITY'S NEED FOR ADDITIONAL LOCAL SERVICE

The court below indicated that the "choice of local service" principle, which it characterized as "a gloss on § 307 (b) of the Communications Act," is pertinent only "in circumstances of otherwise approximately equivalent community need" (R. 317). It is not clear that this observation was necessary to the court's decision in this case, for the court expressed no disagreement with the Commission's view that, in respects other than available "choice of local service," there was a close equivalence between the needs of Easton and Allentown for an additional station. It seems likely, nevertheless, that the minor, residual significance the court attached to the factor singled out by the Commission as "decisive" (R. 211) explains to some degree its rejection of the Commission's decision. And it will, in any event, clarify the inquiry here to state the Commission's

position that the objective of supplying a community with a choice of locally originating programs is not merely the lowest item on a list of factors comprising the need for service, to be weighed in the balance of community needs only when there is no other point of distinction. This factor is in itself a substantial element of any case in which it appears, entitled always to be weighed in determining the needs of competing communities for additional service.[14] It accords with the policy of Congress expressed long ago (see pp. 42–43, *infra*) that equality in radio service means equality in local transmission facilities as well as in sheer number of radio signals which can be heard. See *Newark Broadcasting Corp.*, 11 F. C. C. 1269, 1271 (on rehearing).

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[14] Respondent's brief opposing certiorari contains the undocumented and erroneous assertion (p. 8, fn. 7) that the Commission, if its decision here were upheld, would later grant "routinely" an application by the Easton applicant to move its station to Allentown. To the contrary, the Commission has made it clear that the mandate of Section 307 (b) requiring equitable distribution of radio service governs not only contested proceedings like the one here but also cases in which a licensee applies to move its station from one community to another, even when such an application is unopposed. *WDZ Broadcasting Co.*, 4 Pike & Fischer, Radio Regulation 302 (application for authority to move station from one city to another designated for hearing on issues "relating primarily to whether the proposed move would provide a fair, efficient and equitable distribution of radio service to the communities concerned"); and see *Ark-Valley Broadcasting Co.*, 7 Pike & Fischer, Radio Regulation 77, 78–79.

This position reflects what we believe to be an obviously sound judgment that the public interest is furthered when the people of a community are provided wherever possible with a program service adapted to their needs, affording outlets for local self-expression and programs geared to local interests. Implementing this principle, the Commission has repeatedly held that a first outlet for local self-expression in one community is a more pressing need than the desire for a multiplication of outlets in larger communities.[15] Similarly, in *Northwestern Ohio Broadcasting Corp.*, 3 Pike & Fischer, Radio Regulation 1945, affirmed, 176 F. 2d 951 (C. A. D. C.), the Commission extended this doctrine and held, as here, that a community of substantial size should be granted a second local station in preference to granting additional local service to a larger community already enjoying a number of locally originating services. This policy has not only been applied in subsequent standard broadcast cases,[16] but has been adopted in the allocation plan promulgated by the Commission to govern the assignment of television

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[15] *Newnan Broadcasting Co.*, 11 F. C. C. 1369; *Lee-Smith Broadcasting Co.*, 12 F. C. C. 589; *Finger Lakes Broadcasting System*, 11 F. C. C. 528; *WMAK, Inc.*, 11 F. C. C. 850; *Southern Media Corp.*, 11 F. C. C. 688.

[16] *Lake Huron Broadcasting Corp.*, 6 Pike & Fischer, Radio Regulation 1185; and see *Vermilion Broadcasting Corp.*, 7 Pike & Fischer, Radio Regulation 602 (b).

stations throughout the country. See 17 F. R. 3912.[17]

The policy of seeking to provide a "choice of local service" is peculiarly within the competence of the Commission in administering Section 307 (b). In every case, the views of the agency charged with the implementation of such a provision are entitled to great weight. *National Labor Relations Board* v. *Hearst,* 322 U. S. 111, 130–133. This is particularly true where Congress, as in this instance, has deliberately left to the agency the task of formulating specific rules

[17] In the Report and Order in the rule-making proceeding which resulted in the adoption of the Commission's nationwide television allocation plan, the Commission stated that in attempting to carry out the objectives of Sections 1 and 307 (b) of the Communications Act, 47 U. S. C. 151, 307 (b), it based its determinations on principles which were expressed in terms of the following priorities:

"Priority No. 1: To provide at least one television service to all parts of the United States.

"Priority No. 2: To provide each community with at least one television broadcast station.

"Priority No. 3: To provide a choice of at least two television services to all parts of the United States.

"Priority No. 4: To provide each community with at least two television broadcast stations.

"Priority No. 5: Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities."

and criteria for effectuating the broadly stated objectives of fairness, efficiency, and equity.

The legislative history of Section 307 (b) leaves no doubt that the effectuation of the general mandate of the section was to be accomplished through the exercise of Commission judgment. Congress had attempted in the Davis Amendment (fn. 9, *supra,* p. 29) to set forth the precise method by which the objectives of the section were to be accomplished. It provided, in pertinent part (45 Stat. 373):

> It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible, make and maintain an equal allocation of broadcasting licenses, * * * to each of said zones when and insofar as there are applications therefor; and shall make a fair and equitable allocation of licenses * * * to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population.

The Davis Amendment was repealed and the present language of Section 307 (b) enacted because the Federal Communications Commission had found that the drawing of artificial zone lines as guides in allocating radio facilities could not be accomplished satisfactorily. S. Rep. No. 1588,

74th Cong., 2d Sess., on S. 2243, pp. 2–3; H. R. Rep. No. 2589, 74th Cong., 2d Sess., on S. 2243, p. 3. The desire of the Congress to leave the problem of devising the best method for meeting the needs of the various communities and sections of the country to the judgment of the Commission was made abundantly clear in the debate on the bill (80 Cong. Rec. 6032):

> The purpose is to restore the provisions of the original act. The original act contained practically the same provisions as the bill in question. Later there was agitation to divide the country into various zones, and to provide that the Commission should allocate radio frequencies only to those particular zones. The engineers of the Commission and the Commission itself since that time have found many difficulties in allocating frequencies to particular zones; and they desire to have the matter left to their discretion, because the zone idea has tied them down on account of the contour of the country in some places, and so forth.

It is clear that the choice of local service principle is an implementation of the Congressional objective, for it accords significant weight to the needs of any community for local transmission facilities, as distinguished from the reception of radio service, and the Davis Amendment specifically referred to the equality of transmission as well as reception services.

As against the Commission's judgment that a choice of local service may in any case constitute a weighty desideratum, the court below suggested no reason for its statement that this factor must in all cases be subordinated to any other conceivable consideration bearing upon the need of a community for service. In a time when the loss of opportunities for local self-expression and individualization is widely decried, it is difficult to perceive how such a view could be justified. To be sure, the Commission has never argued, at the other extreme, that provision for a choice of local programming must always be the decisive concern. It has held only, and we urge here, that this is a factor among others, to be accorded the weight warranted by the facts of the particular case. The weight to which it is entitled in a particular case presents a matter for exercise of administrative judgment and policy, not a question of law to be determined by a court on review.

In the instant case, the Commission concluded, after finding the other factors evenly balanced, that the need for a choice of local service was decisive. The careful findings and reasoning underlying this conclusion [18] should not have been

[18] Judge Prettyman, dissenting below, stated (R. 323): "I have never seen more meticulous compliance with the requirements for findings by an administrative agency. There are sixty printed pages of them. They are full, understandable, and abundant in references to the evidence.

"The reasoning upon which the Commission reached its

disturbed upon review. The court below erred in laying down an unsupportable rule of law that choice of local service is the least of the possible elements of need.

II. THE COMMISSION PROPERLY REVERSED THE CONCLUSIONS OF THE HEARING EXAMINER WITH RESPECT TO THE QUALIFICATIONS OF THE EASTON APPLICANT

The Commission's Trial Examiner concluded that the Easton applicant (R. 126), as well as the Allentown applicant (R. 124), was "legally, technically, financially, and otherwise qualified to become the licensee of the radio broadcast station proposed in its application here under consideration." She also found, however, in comparing the respective abilities of the applicants (see R. 132), (1) that because it had failed to detail which local programs would be eliminated if it later secured a network affiliation, the Easton applicant had not disclosed "with the required certainty the program service which would be rendered by the proposed station at Easton" (R. 143–144); and (2) that "on this and other subjects", Easton witnesses had "not made the frank, candid, and honest disclosures * * * which the Commission has a right to expect of an applicant" (R. 144; see, generally, R. 143–145).

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ultimate decision is clearly stated and is fully justified by the record."

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The Commission considered in detail and rejected both of these findings, concluding (1) that program proposals "are not a rigid straitjacket beyond which future operation must never vary" and that the possibility of a future network affiliation did not render Easton's proposals "so uncertain as to preclude any findings or conclusions based thereon" (R. 214–215); and (2) that the Examiner's characterization of Easton's witnesses as lacking candor, "based primarily, if not exclusively, upon her interpretation of the testimony offered rather than the demeanor of the witnesses involved" (R. 260, n. 2), was unwarranted (R. 204–206, 260–261). In the decision of the court below (R. 318–320), these disagreements of the Commission with its Examiner are the basis for the conclusion (R. 317–318) that there was "no substantial evidence in the record as a whole * * * to support the essential underlying finding that the ability of the applicants to serve their respective communities was about equal." The court concluded that under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, findings like those of the Examiner here concerning candor cannot "'be overruled without a very substantial preponderance in the testimony as recorded.'" (R. 319–320, quoting *National Labor Relations Board* v. *Universal Camera Corp.*, 190 F. 2d 429, 430 (C. A. 2, on remand from this Court).) In addition, the court held the Commission's findings inade-

quate on a third phase of the record; it held (R. 322) that on remand "the Commission must re-evaluate the effect of the Easton Company's news monopoly and its past conduct *on the issue of the relative abilities of the two applicants* to serve in the public interest." (Emphasis added.)

It should be noted that all three of the matters thus presented—certainty of program plans, candor, and monopoly—are specifically related by the court below to the "issue of the relative abilities of the two applicants * * *." For apart from this question of comparison, the court expressed no disagreement with the Examiner's and the Commission's conclusion that the Easton applicant was "legally * * * and otherwise qualified" to serve the need of Easton for an additional station. It might appear, therefore, that if we are correct in Point I of this brief—if, that is, there was no occasion to compare the applicants' relative abilities once it was determined that the Easton applicant alone was qualified to serve Easton's greater need—it becomes unnecessary to consider the further problem discussed here.

We believe, however, that resolution of this problem is in fact fairly required for a proper disposition of the case. This is so, at least, with respect to the Commission's rejection of the Examiner's findings that Easton's witnesses were reluctant, evasive, and lacking in candor. As the Commission said (R. 204), despite the Examiner's stated conclusion that Easton was qualified, these

findings raised a "serious question as to the qualification of the Easton applicant to be a radio station licensee * * *." Cf. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, 227. The Commission did not hold that it would have granted Easton's application had it agreed with these findings or felt bound, despite its disagreement, to accept them as correct. And it is plain, of course, that the Commission saw a need to consider these findings at some length and in detail, ultimately concluding that they were incorrect (R. 204–206, 260–261).

Accordingly, we undertake here to demonstrate that the court below erred in holding that the record could not justify the Commission's rejection of some of its Examiner's findings. The holding rests, in our view—and in the view of Judge Prettyman, dissenting below—upon a misconception of the nature of the findings in issue and of this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474. Granting the weight to which the Examiner's conclusions were entitled, and which they were accorded by the Commission in its evaluation of the record, the decisive point remains that the Commission's basic findings on the subsidiary matters in issue were carefully considered, closely reasoned, and supported by substantial evidence on the record as a whole.

A. THE COMMISSION'S FINDINGS AS TO THE ALLEGED EVASIVENESS AND LACK OF CANDOR

The Examiner's findings that witnesses for the Easton applicant had been reluctant, evasive, and lacking in candor were related in her decision to three portions of the testimony, scattered through some thirteen pages of a printed record here which is taken from a stenographic transcript of 2141 pages. The items in question (printed in full as an Appendix to this brief, pp. 75–84, *infra*), the Examiner's inferences from them, and the Commission's differing conclusions are as follows:

a. *Possible network affiliation.*—All of the testimony on this subject appears in pages 288–291 of the printed record (and pp. 75–77, of the Appendix, *infra*). The basic findings of the Examiner and the Commission on this matter are virtually identical (compare R. 102–104 with R. 199–201). Both pointed out that Easton's application stated that a network affiliation was not contemplated, but that Easton would consider carrying network programs if they should become available, if they were not already received in the Easton area, and if they would not interfere with the applicant's plan to give a complete local service to the community. On direct examination the proposed general manager of the Easton applicant's station made no reference to network programs. On cross examination he stated that the "present plan" (as distinguished from Easton's plans at the time of the first hearing) did not include net-

work programs and that there had been no conversations with a network for five years. He later stated that there was a possibility that an affiliation agreement might be entered into in the remote future, and then that if, after Easton received a license, a desirable network affiliation seemed to be available, "we would probably call them". The Examiner thought that the applicant had "swayed back and forth in the breeze of indecision on this point" (R. 142), and that its witness, as shown by the content of his testimony, had "displayed an attitude of evasiveness and lack of candor on the subject" (R. 143; see pp. 56–61, *infra*).

The Commission concluded, however (R. 205):

> We are satisfied from our examination of the testimony in question, as well as from the record as a whole, that there is no persuasive indication of reluctance, evasiveness, or lack of candor on the part of the Easton witnesses, and that, to the contrary, the testimony of such witnesses properly viewed, gives an overall appearance of consistency, candor, and straightforwardness. Concerning the network affiliation and programming plans of the applicant, we think the testimony is nowhere inconsistent with the applicant's position that a network affiliation is not presently planned, but may occur if a desirable affiliation becomes available in the future. The failure to testify as to network plans on direct examination does not appear to be significant in the ab-

sence of a present plan to affiliate and program proposals based on such a plan.

b. *Circulation of out-of-town newspapers.*—All of the testimony on this subject appears in the printed record in pages 278–280, 281–284 (and Appendix, *infra*, pp. 77–83). The basic findings of the Examiner and the Commission are identical, except that the Commission's point out the difference between circulation in the city of Easton and in the Easton *area* (compare R. 66 with R. 172). In response to a question from his counsel asking what papers are published or circulated in the Easton area, the witness listed some five dailies besides those in New York and Philadelphia, and seven weeklies. In response to a question concerning the circulation of the Bethlehem and Allentown papers, the witness referred to figures published by an association of the newspapers in the area, and read the total circulation for those papers. On cross-examination the witness pointed out that the association's circulation figures for Easton included only the city itself and several small towns, not including Allentown and Bethlehem (which are in the same metropolitan area), and gave the listed circulation for the Allentown and Bethlehem papers in Easton. After a long line of questions concerning the circulation of various daily papers *in Easton*, the witness was asked whether he had any circulation figures for the weekly newspapers. He said he did not. (R. 283.) When counsel

asked whether they were all small papers, the witness gave their approximate total circulation (R. 283). The witness also stated that he had not intended to imply on direct examination that these weekly papers had any circulation in Easton (R. 284).

The Examiner thought that the witness, in listing all the papers published and circulated in the Easton *area,* even though the circulation of those papers in Easton itself was minimal, tried to create the misleading impression that Easton's newspaper had substantial competition (R. 144), and that he was being evasive when he first denied having figures for the circulation of the weekly papers and then gave the approximate total circulation (R. 144). The Commission disagreed (R. 205–206), pointing out the context in which the questions were asked, and noting the distinction, which had been ignored by the Examiner, between circulation in the city of Easton and in the general area which was the subject of the hearing.[19]

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[19] The witness merely read into the record figures from a publication available to all the parties. His original statement with respect to the circulation of Allentown and Bethlehem dailies was in response to a question asking for the circulation figures for those papers, and it was preceded by a reference to a question in the first hearing about the circulation of the Bethlehem newspaper. In his dissenting opinion, Judge Prettyman treated of this matter as follows (R. 327):

"I note a few features of this episode. (1) No false statement is alleged to have been made. One counsel asked for

c. *The 1950 dividend payment.*—All of the testimony on this subject appears at R. 285–286 (Appendix, *infra*, pp. 83–84). In response to a question asking the size of the dividend paid by Easton in 1950, the witness refused to state the exact figure without checking his records. The Examiner thought that a person as familiar with the affairs of the company would have the figure at his finger tips (R. 144). The Commission found that his inability to state the size of the dividend was "not incomprehensible in view of the apparent lack of any reason to be prepared to answer such a question," and that this could not "give rise to a finding of evasiveness in the absence of any showing that he actually knew the answer and was attempting to evade placing it in evidence" (R. 206).

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some figures, and his opponent asked for more. All were truly given. (2) The nub of the present point is an impression on the part of the examiner that the witness attempted to create an impression. If it was an attempt by the witness it was not too smart an attempt. All the figures were apparently in the same publication, readily available to anybody. (3) The point was trivial. The Easton Press is the only paper published in Easton. How many out-of-town papers were sold there was of minimal importance. (4) Trial counsel generally will be startled to learn that, if they inquire about a subject and an opponent develops further facts about it, this court is of opinion that the failure of initial full development upon direct examination can, in the absence of any false statement, be used as a basis for reducing all the testimony on that side of the case to less than substantiality. I think so mighty a conclusion cannot properly be drawn from so tiny a premise."

The Court of Appeals recognized that, in its consideration of each of the three foregoing items, the Commission had carefully appraised the Examiner's conclusions in reaching its contrary conclusions. The majority, however, rejected the Commission's finding that the Examiner had based her findings "primarily on what was thought to be conflicts in the testimony of such witnesses, the eliciting by cross-examination of certain information which the Examiner considered should have been made clear during the witness' direct testimony, and a professed lack of knowledge of a matter which the Examiner considered the witness reasonably should have known" (R. 205). Instead, the court concluded, the Examiner had based her findings of evasiveness and lack of candor "in large part" on her "evaluation of the demeanor, bearing, delivery, etc.," of the witnesses. The court accordingly found itself free under this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, and the opinion of the Court of Appeals for the Second Circuit in the same case on remand (190 F. 2d 429), to reverse the Commission unless there was a "very substantial preponderance" of record evidence to support the Commission's reversal of its Examiner. (R. 319–320.) And it found no such preponderance.

Each of the court's conclusions, we submit, is unsound. (1) The Examiner did not purport to

base her conclusions as to evasiveness or lack of candor on the bearing or demeanor of the witnesses, nor is any such evaluation a necessary part of her findings, as the court below apparently believed. (2) More important, the *Universal Camera* decision does not impose, but plainly warns against, a "substantial preponderance" test for agency review of an examiner's findings, even in situations which, unlike the present one, do involve consideration of demeanor by the examiner in determining what is to be found as a fact. (3) Finally, it is clear, from an examination of the record, that the Commission was correct in its conclusion that the testimony criticized by the Examiner failed to disclose any evasion or lack of candor on the part of the Easton witnesses.

1. Both before and since the *Universal Camera* case courts have stressed the special consideration which must be given to the determinations of the trier of fact when they are based upon his observation of the demeanor of witnesses. Such reliance upon witnesses' demeanor may be manifested by the trier's express statement of his mental processes, or it may be inferred from the nature of the determination he has made. A typical example of a determination in which it may be assumed that demeanor evidence played a part is that which occurs in many Labor Board cases where an issue of fact concerning the reason for the firing of an employee requires the resolution of conflicting testimony given by several wit-

nesses. In such a case, the decision of the examiner to give credence to one line of testimony and to discredit conflicting testimony may be based, in part at least, upon observation of the demeanor of the witnesses.[20] And the same is true when a trier of fact accepts as true or rejects as false the uncontradicted testimony of a single witness.[21]

But where the inference drawn from the testimony of a witness is something other than whether it is true or false (as, for example, in this case, whether the testimony reflects upon the character qualifications of an applicant), it cannot be assumed that the inference is necessarily based, even in part, on the demeanor of the witness.[22] In such a case reliance on demeanor can only be discovered either from an express statement by the Examiner that demeanor evidence was in fact involved in reaching the conclusion, or from some other extrinsic evidence to this effect. In the present case, on the other hand, not only is there lacking any express statement or other evidence of reliance upon demeanor, there is an affirmative demonstration by the Examiner

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[20] See, e. g., *National Labor Relations Board* v. *Chautauqua Hardware Corp.*, 192 F. 2d 492 (C. A. 2).

[21] *Quock Ting* v. *United States*, 140 U. S. 417; *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C. A. 9), affirmed, 346 U. S. 482.

[22] This is the distinction between "testimonial" and "derivative" inferences discussed in *American Tobacco Co.* v. *The Katingo Hadjipatera*, 194 F. 2d 449 (C. A. 2), and *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484 (C. A. 2), referred to by Judge Prettyman below (R. 329).

in her decision that she based her judgment on what the witnesses said or failed to say rather than on their manner of saying it or general bearing.

Thus, immediately following the Examiner's statement in her decision that an Easton witness "displayed an attitude of evasiveness" on the subject of Easton's plans for a network affiliation (R. 143), she went on to explain the basis for this conclusion. She referred to a paragraph of her findings (Par. 126, R. 102–104) in which the witness' testimony on this subject is set forth verbatim, and quoted excerpts from this testimony which she felt supported her conclusion of evasion and lack of candor. There is no indication in the Examiner's opinion that she relied upon anything other than the cited record testimony in reaching her conclusion. Similarly, the Examiner's statement that the "testimony" of an Easton witness "created the impression", on direct examination, that the Easton Express had substantial competition from Allentown and Bethlehem papers, but that he "admitted" on cross-examination that the circulation of the competing papers was minimal, is clearly based upon the Examiner's evaluation of the testimony of record, rather than the manner of its presentation (R. 144, 66). Indeed, she introduced this observation by pointing out that it came from a "study of this record" (R. 144), and her remarks leave no doubt that it was

nothing more. She simply believed from their content that the *statements* of the witness were misleading—a belief which the Commission, properly we think, found itself unable to share (*supra*, pp. 10–11, 46, 49–53). The point of present importance, at any rate, is that the "study of this record" was ultimately the responsibility of the Commission, and was a task the Commission was in no way disabled from performing.

The court below found an indication in the phrasing of the Examiner's conclusions on evasiveness and candor that these were based on demeanor, because she said a witness "displayed an attitude of evasiveness" with respect to a possible network affiliation and "created an impression" contrary to the later developed facts as to competition of other newspapers with that of the Easton applicant. "Attitudes displayed and impressions created by a witness", the court stated, "are *usually* demonstrated by hesitations, intonations and inflections of voice, gestures, etc., as well as by what appears in the record" (R. 319, fn. 21, emphasis added). But even if we assume that this is "usually" the case, it is clear from what the Examiner herself stated that in this case her conclusions were based on no such considerations.

Here, the Examiner drew inferences as to character, not from demeanor (mannerisms, expressions, or other such phenomena, observable only by her), but from the content of admittedly

true statements of the witnesses, which were amplified accurately upon further questioning. Thus, the Examiner did not find that Easton intended to do otherwise than as its witness testified with respect to assuming a network affiliation. On the contrary, one of her conclusions adverse to Easton was that although at some time in the future it might seek and acquire a network affiliation, it had not shown which local programs it would drop in the event a network affiliation was ultimately obtained (R. 143). In other words, she believed the testimony on a possible network affiliation (and that testimony accorded exactly with the representation made by Easton in its application). But she thought that the statements of Easton's witness on this subject in the course of clarifying its position were sufficiently unclear for her to conclude that Easton was not as frank as applicants before the Commission should be (R. 145). This was not a finding of credibility, but a "derivative inference" based on the contents of the testimony. Similarly, with respect to the circulation of out-of-town newspapers in Easton, the Examiner accepted the testimony of the Easton witness (R. 66–67, 320). Here again, her conclusion as to the applicant's character was inferred from the content of the testimony.

A fair reading of the brief portions of the Examiner's decision in issue can support no other conclusion. As we have noted, the question

whether triers of fact have relied upon demeanor can only be answered by examining the nature of their determination and what they have said about it. Hearing examiners for administrative agencies—schooled in the task of explaining what they have done and why they have done it, and recognizing that their written decisions must provide intelligible aids to the ultimate decisions, which are the agency's responsibility—frequently make explicit their judgments based upon demeanor.[23] On the other hand, the references of the Examiner in this case to "attitudes displayed" and "impressions created" by the wit-

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[23] See, e. g., *Andrews Co.*, 87 N. L. R. B. 379, 391, 392 (one witness' "demeanor * * * was hesitant and wavering," another's "demeanor and testimony demonstrated a belligerent temperament"); *Pinkerton's National Detective Agency*, 90 N. L. R. B. 205, 224 (witness "looked inquiringly" at union representative before answering questions, had to be requested to look at questioner, "was not a straightforward witness"); *Happ Brothers Company, Inc.*, 90 N. L. R. B. 1513, 1566, set aside on other grounds, 196 F. 2d 195 (C. A. 5) (witness "extremely nervous," "broke into tears" for no apparent reason, displayed "evident unhappiness at the predicament into which her conflicting and confused testimony had gotten her"); *WKRG-TV, Inc.*, 10 Pike & Fischer, Radio Regulation 225, 252 (examiner credited witnesses whose "general demeanor and forthright manner of address as witnesses carried an unusually high degree of persuasiveness"); *Garfield Medical Apparatus Co.*, 8 Pike & Fischer, Radio Regulation 958, 975–979 (in affirming examiner's unreported decision, the Commission pointed out that he had relied, in choosing between lines of conflicting testimony, upon his observation and evaluation of the demeanor of witnesses).

nesses are, when read in their context, merely descriptive of what was conveyed to her by the substance of the testimony the witnesses gave. The whole focus of her discussion is on the testimony. Not a concrete word is said about demeanor or suggests reliance upon it. In short, as the dissenting judge below stated (R. 328, 330), the Commission was clearly justified in concluding that her conclusions as to evasiveness and lack of candor were "based primarily, if not exclusively, upon her interpretation of the testimony offered rather than the demeanor of the witnesses involved" (R. 260, fn. 2). And the Commission was in just a good a position as the Examiner to draw inferences from that testimony in the record, even though it did not see or hear the witnesses.

To give exclusive or primary significance to the Examiner's conclusions in this situation goes far beyond the holding of this Court in the *Universal Camera* case. In discussing the significance of the Examiner's report in review of agency action by appellate courts, this Court there stated (340 U. S. at 496):

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence sup-

> porting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of the testimony. *The significance of his report, of course, depends largely on the importance of credibility in the particular case.* [Emphasis added.]

Nothing in reason or judicial experience suggests that in the situation here presented the Commission is less competent than its Examiner to arrive at conclusions respecting the character qualifications of an applicant based upon testimony of record. Indeed, such judgments lie at the heart of the Commission's responsibility. And, as we have shown, "credibility" played no meaningful role in the Examiner's observation that the Easton applicant, though fully qualified, had been "evasive" in that a witness' testimony did not disclose at once all the facts elicited a moment later by further questioning—or that, in another instance, a witness stated an inability to give from memory a figure for which everyone knew records were available and which could readily have been obtained from these records if the matter had been more than utterly trivial. In such circumstances, it distorts the relative

roles of agency and examiner to give the latter's appraisals of the record a status approaching unreversible finality.

Appellate courts have much more severely restricted powers of review of lower court findings than administrative agencies have over the findings of examiners. Yet appellate courts do not hesitate, in an appropriate case, to substitute their own "derivative inferences" for those made by a trial judge, although they will not disturb a trial judge's "testimonial" or direct credibility inferences. *American Tobacco Co.* v. *The Katingo Hadjipatera,* 194 F. 2d 449 (C. A. 2). *A fortiori,* an administrative agency may substitute its own "derivative inferences" for those of its examiner, where such inferences rest on the significance of the recorded testimony as accepted or rejected by the examiner. This is particularly true with respect to "findings" of the type involved here—relating peculiarly to the kind of ultimate judgment for which the agency alone is responsible.

2. Leaving no doubt of the difference between the relationship of an appellate court to a trial court and that of an administrative agency to an examiner, this Court in the *Universal Camera* case said (340 U. S. at 492): "The responsibility for decision * * * placed upon the [agency] is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when

they are 'clearly erroneous.'"[24] Thus, even if it could be argued that the Examiner's finding of lack of candor in the disputed portions of Easton's testimony was in some degree an inference from "demeanor evidence," the standard applied by the court below for judging the validity of the Commission's contrary finding was improper. Rejection of the Examiner's findings, the court said, could be justified only by a "very substantial preponderance in the testimony" (R. 319–320). As the dissent noted (R. 329), the court cited, in reaching this conclusion, cases involving review by appellate courts as well as cases of agency findings contrary to examiners'. It would be hard to distinguish between a rule that findings may be reversed only when "clearly erroneous" and a rule that reversal may be justified only by a "very substantial preponderance in the testimony." The latter formula can no more be justified than the former under this Court's decision in *Universal Camera*.

The decision in *Universal Camera* settled, of course, what many courts and commentators had long asserted—that, in determining whether an agency's decision is supported by substantial evidence on the record as a whole, a reviewing court must "give to the examiner's report such pro-

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[24] Cf. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 285–6: "[T]he Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence."

bative force as it intrinsically commands." 340 U. S. at 495. For "an examiner's report is as much a part of the record as the complaint or the testimony" (*id.* at 493), and the court is enjoined to consider the record "as a whole." This Court cautioned, however, that the need to appraise the examiner's report for its probative force in each particular record should not obscure the fact that it is the agency's responsibility to decide, that an agency need not find its examiner's findings "clearly erroneous" in order to disagree with them, and that it is the agency's decision which must be sustained if it is supported by "substantial evidence" on the whole record, including the examiner's report (*id.* at 496–497, quoted *supra*, pp. 61–62).

These admonitions are, in our view, clearly contrary to the test of "very substantial preponderance" adopted by the court below from the opinion of Judge Learned Hand in the *Universal Camera* case on remand from this Court. 190 F. 2d 429, 430. We have no occasion here, of course, to quarrel with the actual result in the latter case. The issue there—relating to a critical matter of the motive for discharge of an employee—was in fact an issue of "veracity" or "credibility" in the strictest sense. But we believe the formula announced by Judge Hand (and questioned in Judge Frank's concurring opinion) is in its terms an extreme one; that it suggests an approach out

of harmony with both *Universal Camera* and the administrative agency's "responsibility for decision" stressed by this Court; and that, above all, its application in the circumstances of this case has led to error.

It may well be that, in a particular case where decision turns on whether a witness lied or told the truth concerning a vital issue, an examiner's finding on credibility will be almost impossible to assail. But the problem in such a case, as in every case, is not the quantum of evidence required to "reverse" the examiner, but whether "substantial evidence on the record considered as a whole" sustains the findings of the agency. The distinction we suggest may be unimportant in most cases. But it focuses on the problem properly before the reviewing court. It prevents such a court from supposing—as the language of some decisions suggests some courts may have supposed—that the question is whether to "affirm" the examiner or affirm the agency. See *Boeing Airplane Co.* v. *National Labor Relations Board*, 217 F. 2d 369, 373, 374, 378 (C. A. 9) (court "affirms the findings of the Intermediate Report in their entirety"; "affirms the Board in accepting the findings of the Examiner" as to some issues; finds that "the attitude and temper of the Examiner were more judicial"; and "disapproves the findings of violations contrary to those of the impartial hearing officer"); *United States Steel Co.* v. *National Labor Relations Board*, 196 F.

2d 459, 465, 467 (C. A. 7) ("The record as a whole substantiates the finding of the trial examiner," and the court accepts this finding rather than the Board's); *Ohio Associated Tel. Co.* v. *National Labor Relations Board*, 192 F. 2d 664, 668–669 (C. A. 6) (examiner's "finding is sustained by substantial evidence and * * * the Board was in error in disapproving the examiner's recommendation").[25] And it points up the error of the court below in rejecting the Commission's findings because it was not "convinced" that there was "a very substantial preponderance" in the testimony to refute the Examiner's findings.

3. Judged by the proper test of "substantial evidence" applicable to the *agency's* findings, the Commission's decision on the problem of "candor" should have been sustained. We reemphasize in this connection that the Examiner's finding which the Commission rejected is not a finding of "credibility" at all. And we note that although the majority below thought it rested to some degree on "demeanor evidence," the majority went no further than to say the finding "is not derived *solely* from evidence preserved in the printed record" (R. 319, fn. 21, emphasis added).

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[25] See also the majority opinion below (R. 320): "We think the Examiner rightly concluded that the witness sought to create the misleading impression that his newspaper had substantial competition from the Allentown and Bethlehem dailies." And with this compare the dissent (R. 326–327).

Even accepting this characterization of the finding, it is apparent that what was done mainly by the Examiner, by the Commission, and by both the majority and the dissenting judge below was to consider whether evasiveness was displayed by part of the testimony of two Easton witnesses—testimony covering the few pages reproduced in the Appendix to this brief as against the 307 pages of testimony by these witnesses in the stenographic transcript. The majority below agreed with the Examiner's view. Judge Prettyman, commending the Commission for the meticulous care shown in its findings (R. 323), defended the Commission's view in an exhaustive analysis upon which we strongly rely (R. 324–330). Without repeating that analysis or detailing again the reasoning on which the Commission held the finding of evasiveness unwarranted (see pp. 49–53, *supra*), we submit that there was at most a close balance between the views of Examiner and Commission. In these circumstances, it is pertinent to recall this Court's declaration in *Universal Camera* that the statutory requirement of review of "the whole record" in determining the adequacy of agency findings does not mean "that even as to matters not requiring expertise a court may displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." 340 U. S.

at 488. The court below, though it sided with the Examiner in the process, chose one of "two fairly conflicting views." Such a choice cannot justify reversal of the Commission's decision, which was reasonable and supported by substantial evidence on the record as a whole.

E. EASTON'S PROGRAMMING AND OWNERSHIP OF OTHER COMMUNICATIONS MEDIA

Two conclusions of the court below remain for consideration here: (1) That the programming plans of the Easton applicant were uncertain because it was not definite whether a network affiliation would be obtained in the future (R. 318–319). (2) That since this applicant owned the only newspaper, the only television station, and one of the two FM stations in Easton, and though the Commission had considered this very matter in ruling the applicant qualified, the Commission should have further appraised a discontinued practice of Easton's newspaper "in weighing the relative abilities of the competing applicants" (R. 320–322). Although it adopts the conclusions of the Examiner on these aspects of the case, the court does not base its decision upon the primacy of the Examiner's views. There was no disputed testimony on these subjects, and the basic findings of the Commission were essentially those of the Examiner (compare R. 102–104 with R. 199–201, and R. 66 and 133 with R. 170–172). The problems were carefully considered

by the Commission and it reached conclusions contrary to the Examiner's with respect to their significance (R. 214–215, 206–207). The Commission's conclusions were reasonable. The court below, substituting its judgments for those of the Commission, invaded a province beyond the proper scope of review.

1. The Commission carefully considered the Examiner's conclusion that the record did not disclose with the required certainty the program service which would be rendered by the Easton applicant in the event that its application was granted, because of its failure to show which programs would be dropped if a network affiliation was subsequently secured. The significance of this lack is necessarily dependent upon the licensing policies and practices of the Commission and its experience in the licensing of radio stations. The Commission held in this respect (R. 215):

> The fact that an affiliation may be entered into in the future if a desirable arrangement becomes available does not render these proposals so uncertain as to preclude any findings or conclusions based thereon. Program proposals are not a rigid straightjacket beyond which future operation of the station must never vary. A certain flexibility with the passage of time is not only permissible but also desirable if the licensee is to be free to carry out his responsibility to program in the public interest. Of course, program pro-

> posals are not something to be forgotten once a grant is obtained, and must not be used in such a way as to mislead the Commission as to the intentions of the applicant. There is no evidence that such is the case here. The applicant has frankly stated that a network affiliation is not now planned but may be entered into in the future if a desirable affiliation becomes available. And, it is also stated in the application that should such an affiliation occur, the applicant's plans for a complete local program service would not be disrupted.

This judgment lay peculiarly within the field of the Commission's expertise. Its reasonableness is, we think, apparent on its face. It is, at the least, not so clearly unreasonable—nor did the court below suggest that it was—as to warrant reversal of the Commission's decision.[26]

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[26] In discussing this matter the court below entirely overlooked the Commission's continuing regulatory responsibility with respect to broadcast licensees. The Communications Act requires that broadcast licenses be renewed at no greater than three year intervals, and that renewals should be granted only if the public interest would be served thereby, see Section 307 (d), 47 U. S. C. 307 (d). In considering applications for renewal of license the Commission reviews the station's program service in light of its commitments at the time the license was secured, and there is no doubt that a serious programming deficiency could constitute appropriate grounds for failure to renew a license. *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. 2d 670 (C. A. D. C.); *Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F. 2d 850 (C. A. D. C.), cer-

2. As to the Easton applicant's ownership of the City's only newspaper and television station, and one of two FM radio stations, neither the Examiner nor the court below suggested that these were disqualifying factors. The court pointed out, however (R. 321), that the Easton newspaper, from 1936 to 1948, had failed to carry program logs of the community's one local AM station—a situation the Commission had noted, of which it had expressly stated it did not approve, but which had been discontinued and thus was not deemed to be disqualifying (R. 207). The court's objection in this regard appears to have been mainly to the Commission's failure to consider these matters to compare the relative abilities of the competing applicants (R. 321). If, as we have argued in Point I, no such comparison was required, this issue largely disappears.

We re-emphasize, however, that the factors here considered are nowhere claimed to disqualify the Easton applicant for the license the Commission granted. As to the possible problem of monopolization of communications media—a problem with which the Commission, as the court below recognized (R. 321), has been actively concerned—it is to be noted that the grant of the Easton applicant's license for an AM station actually brings competition to the community in this type of broad-

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tiorari denied, 288 U. S. 599; cf. *G. A. Richards*, 5 Pike & Fischer, Radio Regulation 1292 (1950); *Thomas Lee Enterprises, Inc.*, 5 Pike & Fischer, Radio Regulation 1179 (1949).

casting, which has heretofore been monopolized by a single station not owned by the present applicant. Making this point in his dissent (R. 330), Judge Prettyman went on to observe that

> the permissible amount of concentration of mass communication, involving broadcast stations and newspapers, is peculiarly a problem for the Commission. Here, indeed, is a regulatory problem. Ownership of a station by a newspaper can hardly be denounced per se. In the District of Columbia, two of the four radio-television stations are owned by newspapers. In the instant case the Commission weighed many factors in this connection and produced a judgment on the point. I think the court should let it alone.

We submit that the dissent was correct. In reversing the Commission's decision, the majority below rested primarily upon an erroneous and unworkable standard for the disposition of cases like this one (Point I, *supra*). The court's decision is equally erroneous to the extent that it rests upon judgments of policy substituted for the Commission's, which are reasonable, supported by the record, and wholly within the authority and competence of the Commission.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed and the order of the Commission granting the application of Easton Publishing Co. and denying that of Allentown Broadcasting Corp. should be affirmed.

Respectfully submitted.

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MARCH 1955.

APPENDIX

A. TESTIMONY AS TO POSSIBLE NETWORK AFFILIATION, R. 288–291

By Mr. ROLLO:

Q. I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network programs on your proposed AM schedule.—A. That is correct.

Q. That is your present plan, is it?—A. That is the present plan.

Q. You no longer desire to affiliate with Mutual?—A. There has been no conversation with Mutual in the past five years.

Q. You recall you originally testified you planned to affiliate with Mutual, do you not?—A. I said we expected to discuss it with Mutual, but no arrangements have been made.

* * * * *

By Mr. SCHILDHAUSE:

Q. Mr. Rounsley, you stated, did you not, that you had no current plans to affiliate your proposed AM station with the network?—A. That is correct.

* * * * *

By Mr. SCHILDHAUSE: * * *

A. There would be no time sold for religious programs.

Q. You say that will be a firm policy?—A. That will be a firm policy. I better qualify that. In the event of any network affiliation, any pro-

grams accepted by the network as commercial, any religious programs, may or may not be accepted by the station as commercial. That is in the future, and we made no policy about it.

Mr. ROLLO. Did not you answer a question of mine to the effect that you did not intend to affiliate with the network?

The WITNESS. I did not say we did not intend to, I said we made no overtures at all. That is in the remote possibility that some time in the indefinite future we might affiliate.

By Mr. SCHILDHAUSE:

Q. I presume you or Mr. Stackhouse have discussed, and the Board of Directors, too, I might add, of the Easton Publishing Company have discussed the question of network affiliation. Are you predisposed to accept one if offered?—A. If offered a desirable affiliation, we would certainly consider it.

* * * * *

The PRESIDING OFFICER. Mr. Rounsley, I am a little confused about this network proposition. I wish you would tell me what your plans are with respect to network. Now let us not talk about the dim distant future, let us talk about something not quite so far away.

The WITNESS. If we have an AM facility we would probably explore the possibility of a network affiliation. We would naturally have to see what was available, what the terms are, something we do not know now, but we would explore that possibility.

The PRESIDING OFFICER. Am I to understand you would not wait for somebody to come to you?

The WITNESS. That is correct. In other words, we would have to have something to affiliate before we talk business.

The PRESIDING OFFICER. It is still not clear in my mind. Do you plan to sit by and wait for somebody to approach you, or what would be your procedure?

The WITNESS. I think we would probably see what was available, and after we saw what was available, if there was a network that we thought was desirable and available, we would probably call them.

* * * * *

TESTIMONY AS TO CIRCULATION OF OUT-OF-TOWN NEWSPAPERS, R. 278–280, 281–284

By Mr. LOVETT:

Q. What, if any, other newspapers are published or circulated in the Easton area?—A. Well, the Allentown and Bethlehem dailies, the Newark News, that is Newark, New Jersey, the Plainfield, New Jersey, Courier, and there is a daily at Bangor, Pennsylvania, and the Philadelphia and New York newspapers, dailies. In addition there are several weekly newspapers published and circulated in the area. These include the Phillipsburger, at Phillipsburg, New Jersey, the Star at Washington, New Jersey, the Hunterdon Democrat and Hunterdon Republican at Flemington, New Jersey, and then there are weeklies in the Pennsylvania area published at Nazareth, Windgap and Pen Argyle, I believe, and also at Portland, Pennsylvania.

Q. Have you concluded?—A. Yes.

Q. During the hearing in Allentown some question was asked regarding the circulation of the Bethlehem paper. Do you happen to know the circulation of both the Bethlehem papers and Allentown papers?—A. All of the newspapers in the valley are members of an association known as the Audit Bureau of Circulations. The Audit Bureau of Circulations is composed of members of daily newspapers totaling 1,193 and certain——

Mr. ROLLO. I concede the accuracy of the ABC figures, if that will save any time.

The PRESIDING OFFICER. Very well.

The WITNESS. That is all right. Excuse me. The reports of the Audit Bureau of Circulations for the twelve months' period ending September 30, 1950, show the following average paid circulations for that period: The Easton Express, 43,489, which is an evening publication. The Bethlehem Globe-Times, 23,779, an evening publication.

Mr. ROLLO. What was that figure again?

The WITNESS. 23,779. The Evening Chronicle of Allentown, 20,257, an evening publication, and the Morning Call, 58,250, a morning publication.

By Mr. LOVETT:

Q. That is in Allentown, The Morning Call?—A. Allentown, yes, sir, and the Chronicle, also Allentown, if I did not state it.

Q. Have any other daily newspapers been published in Easton since the formation of the Easton Publishing Company?—A. Yes.

Q. Will you name them and tell what happened to them?—A. The afternoon Easton Free Press was published for a number of years and was merged with the Easton Express in 1926. About

1940 a daily, which became known as The Morning Free Press was established in Easton and was voluntarily suspended in 1945. It was a newspaper which was printed in Bethlehem and circulated in Easton.

* * * * *

By Mr. ROLLO:

Q. Let us go into the question of circulation of newspapers. Do you have your ABC figures before you?—A. Yes, sir.

Q. With respect to the circulation of the Easton Publishing Company, which is 44,400, I believe you said—A. That is the present figure. The average for the 12 months ending September, 1950, was 43,489.

Q. Is that broken down in the report you have before you as to cities or counties?—A. It is.

Q. What is the circulation in the City of Easton?—A. The circulation in the city area which is adopted by the Audit Bureau is 23,931.

Q. Could you state for the record what that area embraces, other than the City of Easton itself?—A. Phillipsburg, New Jersey, Wilson Boro, the boroughs of Glendon, Stockertown, Tatamy, West Easton, the townships of Forks, Palmer, Williams, and in Bucks County Regalsville, and in Warren County Alpha Boro, the townships of Lopatcong and Pohatcong.

Q. Do you know or does the report show what circulation you have in Allentown?—A. It does not.

Q. Do you know of your own knowledge approximately what your circulation is over there?—A. It is under twenty-five.

Q. How about Bethlehem?—A. That is also under twenty-five.

Q. Now the other daily papers that you referred to, I believe the Newark News was one of them, was it not?—A. That is correct.

Q. Where is Newark?—A. Newark is approximately 60 miles to the northeast.

Q. Is that Newark, New Jersey?—A. Yes.

Q. Just across the river from New York?—A. That is right.

Q. I see. Do the ABC figures show the circulation in the Easton city zone?—A. Of the Newark News?

Q. Of the Newark News.—A. No; I do not have those figures.

Q. One of the papers you mentioned was the Plainfield Courier.—A. That is correct.

Q. What town was that from?—A. Plainfield, New Jersey.

Q. Where is that?—A. That would be about 30 to 40 miles southeast of Easton.

Q. And about the same distance from New York?—A. Probably 50 miles from New York.

Q. Do you have the circulation figures of that newspaper in Easton?—A. I do not.

Q. Do you have any knowledge as to the number, of your own personal knowledge?—A. I do not.

Q. Does that also apply to the Newark News?—A. Yes.

Q. Now, the next one you mentioned I think was Bangor, Pennsylvania?—A. That is correct.

Q. Where is Bangor?—A. Bangor is about 20 miles approximately north of Easton, or 18 miles north of Easton.

Q. Do you have the circulation figures of that newspaper?—A. They are not available.

Q. They are not a member of the ABC Audit Bureau?—A. That is correct.

Q. Do you know approximately what the circulation is in Easton of that newspaper?—A. I have no knowledge, but I presume it is nil in Easton.

Q. Do you know what the total circulation of the Newark News or Plainfield Courier is?—A. I do not.

Q. Do your ABC reports show the circulation of the Philadelphia or New York newspapers in Easton?—A. Not these that I have.

Q. Do you have reports available on that?—. . I doubt it.

Q. Would you mind looking at your records and bringing them back to the hearing after the noon recess, if you do have them?—A. Yes.

Q. Do you know of your own knowledge what the circulation figures are on the Philadelphia or New York newspapers?—A. I do not.

Q. There is no other daily newspaper in Easton, is there?—A. That is correct.

Q. And I take it that Bangor, Pennsylvania, is the closest to Easton?—A. Yes.

Q. Other than the Allentown newspapers?—A. That is right, Allentown and Bethlehem newspapers.

Q. Do you have the figures on the Allentown or Bethlehem newspapers?—A. I do.

Q. The circulation figures here in Easton?—A. Yes.

Q. Would you state them, please? Now this is for the city zone.—A. Yes.

Q. That is my question.—A. I will qualify that, that I would not know the figures for the Easton city zone. I know only the figures which they show as their circulation for Easton. I do not know what is included in that.

Q. All right, will you give that?—A. Fifty-nine for the Bethlehem Globe-Times. The Morning Call, 453. The Evening Chronicle, 1.

Q. The 453 for the Morning Call includes those delivered by carriers and dealers and mail, is that correct?—A. That is correct.

Q. That was the morning paper, was it not, 453?—A. That is right.

Q. And the evening paper was one?—A. One.

Q. Do you get that one?—A. Probably do.

Q. Do you have any circulation figures on the weekly newspapers you mentioned?—A. No, sir.

Q. They are all small papers, are they not?—A. No, they are not all small. The Hunterton newspaper is approximately 7,000 circulation, the Washington, New Jersey Star is not a member of the ABC but I believe its sworn statement is in the neighborhood of 5,000. The other weeklies' sworn statements are approximately in the neighborhood of 2,000.

Q. The rest that you mentioned?—A. That is right.

Mr. Lovett. Two thousand each?

The Witness. Yes; each.

By Mr. Rollo:

Q. And those are total figures for the weeklies, not their circulation in Easton?—A. No, that is the total, not in Easton.

Q. Now Phillipsburg is one you mentioned.

That is just across the river from Easton, I understand, is that right?—A. That is right.

Q. What was that Washington Star? What town is that?—A. Washington, New Jersey.

Q. Where is that?—A. About 12 miles east of Phillipsburg.

Q. And Hunterton?—A. That would be in Flemington, New Jersey, about 22 miles southeast of Easton.

Q. Were there two weeklies there or just one?—A. Two.

Q. One called the Democrat and the other called the Republican?—A. That is correct.

Q. Where is Nazareth?—A. Nazareth is about eight miles west, a little northwest of Easton

Q. And where is Windgap?—A. Windgap is about 11 miles north of Easton.

Q. And where is Pen Argyl?—A. They are all practically in the same community, about the same distance north of Easton, 11 miles.

Q. And Portland, Pennsylvania?—A. Portland, Pennsylvania is again north about 24 miles.

Q. Do you have available the populations of these towns that we have just enumerated, that have weeklies?—A. I do not.

Q. Was it your testimony on direct examination by Mr. Lovett that these weeklies had any circulation in Easton?—A. It was not intended so; in the Easton area.

TESTIMONY AS TO AMOUNT OF 1950 DIVIDEND, R. 285–286

By Mr. SCHILDHAUSE:

Q. Did the Easton Publishing Company earn a profit last year?—A. Yes, sir.

Q. Approximately how large was it?

Mr. LOVETT. I object, Madam Examiner, as being entirely immaterial.

Mr. SCHILDHAUSE. I will withdraw it.

The PRESIDING OFFICER. Very well.

By Mr. SCHILDHAUSE:

Q. Did the corporation declare dividends last year?—A. Yes.

Q. What was the size of the dividend?

Mr. LOVETT. I object, Madam Examiner, as being entirely immaterial.

Mr. SCHILDHAUSE. It is possible to draw an inference from this record, Madam Examiner, that the beneficiaries of some of the trust held stock in the Easton Publishing Company, may, at a later date, sell off their holdings in the Easton Publishing Company. That being so, I think it is certainly pertinent, and probably material. The question of dividends is certainly pertinent and probably material to the question of whether they will sell off their holdings.

The PRESIDING OFFICER. Objection overruled. The witness may answer.

The WITNESS. Are you speaking of 1950? You said last year, I believe?

By Mr. SCHILDHAUSE:

Q. Does the corporation keep its books on a calendar year basis?—A. That is correct.

Q. For the year 1950 what were the dividends?—A. I do not have the figures here.

Q. What was the size of the dividends per share?—A. I don't know that without checking the record.

* * * * *

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No. 451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

ALLENTOWN BROADCASTING CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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December 17, 1954

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STATEMENT OF THE CASE

This case involves the assignment of a radio broadcasting station on the frequency 1230 kc. either to Respondent for operation at Allentown, Pennsylvania, or to Easton Publishing Company for operation in the neighboring town of Easton, Pennsylvania (R. 156). Respondent, a Pennsylvania corporation formed in 1945 for the purpose of seeking and operating a radio broadcasting station in Allentown, possesses all necessary qualifications as a radio station licensee. Its only activity is that of operating the assignment involved in the case[1] (R. 172). Easton Publishing Company (referred to herein as "Easton Company"), Respondent's rival applicant, is the owner and publisher of the *Easton Daily Express*, Easton's only newspaper, the licensee of FM radio broadcasting station WEEX, and the licensee of Easton's only television station, WGLV-TV (R. 165). Easton Company did not intervene in this appeal.

Allentown, the county seat of Lehigh County, has a population of 106,000 (immediately contiguous to the City of Bethlehem, 66,000 population) is some 14 miles southwest of Easton, population 35,000 (R. 163). Respondent's station, WHOL, does not provide service to Easton and the station sought by the Easton Company would not provide service to Allentown.

The applications involved in this proceeding were filed in the fall of 1945. Following the original hearing in May 1946, the FCC entered its first decision June 23, 1947 granting Respondent's application and denying that of the Easton Company. Appeal of that decision resulted in the lower Court's original judgment in this case *affirming* the

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[1] Under the FCC authorization granted to Respondent in June 1948, it constructed the station, which was placed in service September 3, 1948 and continuously operated since that date. The FCC in February 1949 granted Respondent a regular license for the operation of its station, WHOL, and this authorization has been continued in force pending final decision in this case (R. 157). Respondent's station WHOL renders a meritorious radio service and enjoys substantial public support (R. 210, 141, 108-122).

FCC decision in part and remanding the case for further findings. *Easton Publishing Company* v. *FCC*, 175 F. 2d 344, 351 (1949):

> "The case must be remanded for findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need. Upon the other points at issue, the conclusions of the Commission are affirmed.
>
> "Remanded for further proceedings."

This remand was pursuant to the Court's holding on the original appeal that "The case involves a comparative consideration of two communities and of two applicants" (p. 346), and that the Commission's findings that "Allentown is in greater need of another radio station than Easton" (p. 348) was made independent of the " . . . comparative qualities, or of the lack of any particular type of service in either community, or of the greater ability of either applicant to meet that need" (p. 349).

Following the remand, FCC, in February 1950, denied pleadings of the two applicants for further findings of fact on the original hearing record and instead ordered a second hearing on all issues (R. 158). Efforts to forestall this action by mandamus petition being unsuccessful, *Easton Publishing Co.* v. *FCC*, 185 F. 2d 987 (1950), a second hearing was held in March, May and June of 1951 (R. 162). The Initial Decision of the trial examiner entered the following June 1952 proposed a grant of Respondent's application and a denial of the Easton Company's application (R. 53-147).

On a review of this Initial Decision of the trial examiner, the Commission, with two members not participating and one Commissioner dissenting, entered an order denying Respondent's application and granting that of Easton Company, in effect reversing the trial examiner's Report and the Commission's original decision (R. 156, 216). This second hearing decision of the Commission was reversed

by the Court below as predicated upon a conclusion contrary to and not supported by substantial evidence.

ARGUMENTS

The rationale of the FCC decision was that (1) on the Allentown *versus* Easton comparative aspect of the case " . . . there is little room for choice between the two communities"; and (2) on the *inter partes* comparative evaluations there are no significant differences between the relative abilities of Respondent and Easton Company or their respective radio service proposals (R. 211). Having thus reduced this then eight-year-old two-hearing case-proceeding to zero equivalence, the FCC chose to pivot its most recent decision in favor of the Easton Company on the " . . . one decisive factor" that Allentown was "afforded a choice between local standard broadcast programs and stations" whereas Easton, unless awarded another AM broadcast outlet, lacked such choice (R. 211-212).

The opinion of the Court below penetrates this decisional ground to the critical conclusion: the approximate equivalence of the two applicants and their service proposals. This key finding was held unsupported by substantial evidence "in the record as a whole—including the hearing examiner's Initial Decision." (Pet. p. 6a).

The Court's decision exposed three underlying defects deemed fatal to the order under review: (1) "Uncertainty as to programming plans"; (2) "Reluctance, evasiveness, lack of candor; and especially the monopoly point"; (3) "Monopoly and concentration of communications media."[2]

Petitioner now advances a novel theory contending that the Commission grounded its decision *solely* on the comparison between community needs, entirely irrespective of the *inter partes* comparative aspects of the case (Pet. pp.

[2] The Court's opinion contends that ". . . the Commission must re-evaluate the effect of the Easton Company's news monopoly and its past conduct on the issue of the relative abilities of the two applicants to serve in the public interest." (Pet. p. 14a).

11, 13). By this new doctrine, the superior applicant and the greater merit of his radio service proposal become immaterial to Commission's award of a broadcast license. This startling thesis is now advanced despite the Court of Appeals' 1949 decision and the terms of its remand which directed further findings on precisely the issue of comparative qualifications of the rival applicants that the Government now disclaims as irrelevant, "extraneous" and "meaningless" under the law.[3]

Petitioner fundamentally misconceives the import of the decision below.

1. *The substantive question.* Whatever substantive merit there may be in the statutory interpretation first advanced in the pending Petition, the proposition was never at issue in this appeal. It was not a contention on behalf of the Petitioner before the lower court.[4] Neither is it a point of difference between the majority and the dissenting opinion in the Court of Appeals. The theory now advanced in the Petition appears at variance with what the FCC was required to do and what in fact was done in the further proceeding under remand of the first appeal. (See FCC Hearing Issues (3) and (5), R. 158-159). It departs from the evidentiary and ultimate findings in the FCC's decision,

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[3] The posture of this case on rehearing was correctly given in the trial examiner's Report (R. 127):

> "In the light of the remand of the Court of Appeals 'for findings upon the comparative needs of the communities for new radio service and the relative abilities of the applicants to serve the greater needs,' *consideration will be given not only to the needs of the respective communities but also to the relative abilities of the respective applicants to meet that need, as disclosed by their past deeds and future plans.*" (Emphasis added)

[4] The Commission's brief before the Court of Appeals stated (p. 6-7):

> "The Commission's decision contains detailed findings of fact as to . . . the applicants . . . and the proposed program service proposals of the applicants."

the greater bulk of which deal with the *inter partes* comparative consideration.[5]

If there is any basis for the charge in the Petition that the Court below was mistaken in what findings the Commission did or did not make, this of itself raises doubt as to deficiencies of the FCC's decision. For the basis for an agency's action " . . . must be set forth with such clarity as to be understandable," and the reviewing court may " . . . judge the propriety of such actions solely by the ground invoked by the Agency." *S.E.C.* v. *Chenery Corp.*, 332 U. S. 194, 196; *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 654. Hence Petitioner's present challenge to the decision below is wholly groundless, but for the suggestion that the Court did not comprehend the FCC's decision, or that it was incomprehensible.[6]

In any event, Petitioner has failed to reconcile its present contention with the express terms of the judicial remand to the agency on the first appeal in 1949. In the second hearing proceeding this mandate directed the FCC to make further findings upon the comparative needs of the two communities for the new radio service *and* (in the conjunctive) the relative abilities of the applicants to serve the greater need. The opinion of the Court on the first appeal expressly held that the FCC was in error in premising its decision upon inter-community needs dissociated from the *inter partes* consideration. Instead its holding in substance was that the needs of the communities related to the particular service proposals were in effect opposite sides

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[5] This issue was given as one of the FCC's reasons for ordering a second hearing (R. 45) "For, the record does not contain sufficient information upon which we can determine on a comparative basis the relative . . . ability of the applicants as presently constituted to meet such needs."

[6] Section 8(b) of the Administrative Procedure Act would seem to require that "findings and conclusions, as well as the reasons or basis therefor, upon all the material issuance of fact, law, or discretion presented on the record" be complete and in form and content which can readily be comprehended by the reviewing court.

of the same coin of the statutory standard "public interest, convenience or necessity." The FCC, having acquiesced in that holding and having urged before the Court below that its further proceeding was in conformity with the terms of the remand, can not now reverse its position and ask this Court in effect to review the Court of Appeals' 1949 judgment. The certiorari process should not be used to resolve belatedly discovered differences between a reviewing court and an agency as to what finding the agency did or did not make, or to entertain Petitioner's latent misgivings about the Court of Appeals' original decision in this case five years ago.

Whether foreclosed or not, the statutory interpretation now urged by Petitioner would substitute "slot machine" determinations for the administrative process, and is unsound. Under Petitioner's novel theory, the FCC in any contested AM-assignment between two communities would merely take a transmitter count—and then award the new facility to the community with fewer existing AM outlets. This would follow, under the Petitioner's contention, quite regardless of whether the application to serve that community favored was tendered by a substantially inferior applicant with a decidedly poorer public service proposal. As illustrated by the Commission's evident intention to award the here contested facility to the publisher of Easton's only newspaper which, in addition, occupies TV and FM channels in that city, factors such as local communications monopoly could not even be considered. Nor would the presence of other potent broadcasting communications media, such as television outlets, in any way count. The right of hearing would shrivel to an empty gesture. And Congressional authority vested in the Commission to apply the broad standard of public interest, convenience and necessity upon the rational interplay of facts and relative factors in support of a reasoned decision based on its expert judgment would be stultified. Above all, no legal foundation supports the current contention that the FCC *must* assign the contested facility to Easton because it had only one other AM radio broadcasting facility

—in utter disregard of qualitative factors determining which among rival applicants should be preferred as better qualified to fill a public need.[7]

Moreover, Section 307(b)—from which the Commission's peculiar assertion purportedly derives—is unique to the FCC, and its interpretation concerns no other administrative agency. In fact, its interpretation in this case is of minimal significance to the FCC itself. Section 307(b), at the present time and for several years, has not been a significant or controlling factor in any but a few proceedings. Of the three classes of broadcasting stations, [(1) AM or standard broadcast stations; (2) FM, or frequency modulation broadcast stations; and (3) the newer television, TV, broadcast stations], the distribution of two classes of assignments, FM and TV, was handled legislatively by adoption of nation-wide allocation plans. *FCC 12th Annual Report, 1946*, p. 16; *Peoples Broadcasting Company* v. *U. S.* 209 F. 2d 286 (1953); *Logansport Broadcasting Corporation* v. *U. S.*, 210 F. 2d 24 (1954); *FCC Rule 3.606 Table of Assignments*, listing the discrete channels assigned to particular communities, 1 R.R. 53:602. The possibility of a Section 307(b) hearing issue in any FM station case proceeding or in any TV station case adjudication is so improbable as to be non-existent. In the older standard broadcast band (550-1600 kc.) already overcrowded with 2,700 stations on its 95 channels, the case proceeding activity in this class of station is quite small and in only a fraction of such cases is Section 307(b) a factor.[8] At the

[7] The hollowness of the Commission's position may be illustrated by the fact that if the FCC decision were upheld and if the Easton Company thereafter applied to move the station from Easton to Allentown, the FCC would grant that removal routinely.

[8] The interpretation of Section 307(b) advanced in this Petition has only one precedent in 27 years of regulation. The first interpretation of Section 307(b) as favoring a grant of a second facility to the smaller of two rival communities had its origin in *Northwestern Ohio Broadcasting Corp.*, 3 R. R. 1945 (1948), aff'd per curiam; *Sky Way Broadcasting Corp.* v. *F.C.C.*, 9 176 F. 2d 951 (1949).

present time, the major activity of the FCC in the broadcast field is in television. During the first eleven months of 1954, the FCC issued ten broadcast decisions in contested cases, eight of which were television, and two standard broadcast cases. None involved a Section 307(b) issue. (Pike & Fischer, R.R. Vol. 10/11)[9]

2. *The "substantial evidence" question.* The lower Court's opinion represents routine application of the substantial evidence rule as given in *Universal Camera Corporation* v. *NLRB*, 340 U. S. 474 (1951). Consideration of the trial examiner's Report, and the part thereof predicated upon demeanor evidence is relied upon only as bearing upon the question of substantial evidence. The lower Court would have been in error had it failed to take into consideration, on review of this substantial evidence question, the division between the trial examiner and the FCC (as well as the FCC member's dissent).

First it may be observed that this point has to do with the lower Court's review of the evidence and its interpretation. But the asserted misapplication of the "substantial evidence" rule is only secondarily involved because the charge is directed not at findings which are defended in the Petition, but as to matters which the Petitioner states the "court below . . . mistakenly thought was a finding." (Pet. p. 11). It also states as to such matter that "the Commission not only did not make such a finding but specifically refused to do so." It would seem, therefore, that if, as now contended by Petitioner, no finding was made on the *inter partes* considerations of the case, it is quite irrelevant to inquire whether findings which were not made are or are not supported by substantial evidence. Moreover, all of the matters to which the substantial evidence question is directed, have no relevance to the inter-community aspect of

[9] If *In re Gulf Beaches Broadcasting Co.* is considered as a Section 307(b) case, the FCC decided it on the *inter partes* considerations, and not on the inter-community aspect, contrary to the contention in this Petition. 11 R. R. ——. (Nov. 29, 1954).

the case which Petitioner asserts was the sole ground of decision.

The FCC has previously been enjoined by the lower Court, in which is conferred exclusive jurisdiction over radio appeals decisions, not to "ignore a material difference between two applicants." *Johnston Broadcasting Company* v. *FCC*, 175 F. 2d 351, 357 (1949).

> "It must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors, conflicting in many cases."

Significant differences between Respondent and Easton Company relevant to the hearing issues in this case, which the FCC decision glossed over or superficially reduced to zero equivalence, (or refused to make any findings on as now asserted) are outlined below.

Uncertainty as to programming plans. The trial examiner found as to the radio service proposal of Easton Company that " . . . the evidence in this proceeding is not at all clear as to the program service which it would actually render in the event of a grant of its application" (R. 142). Upon a consideration of all of the evidence submitted by the Easton Company on this subject, the examiner's Report concluded "that this record does not disclose with the required certainty the program service which would be rendered by the proposed station at Easton in the event of a grant of the application of the Easton Publishing Company" (R. 143). This left the *inter partes* issue balanced decidedly in favor of Respondent, for, as stated in *Plains Radio Broadcasting Company* v. *FCC*, 175 F. 2d 359, 362 (1949); "How can a conclusion be reached as to which proposal is better, if the nature of one of them is not known."

FCC case proceedings have evolved some twenty-six factors for comparative evaluation in broadcast applications (2 Pike & Fischer, R.R. M-1451), two of which are "programming" and "operating plans." Deficiencies in the

preparation of the proposal of one applicant is a factor to be considered in contrast with a superior proposal of the other applicant. *Southern Tier Radio Service, Inc.*, (Initial Decision) 11 R.R. 143 (1954); *WJR, The Goodwill Station*, 9 R.R. 227, 260e (1954); *Tampa Times Company*, 10 R.R. 77, 136 (1954).

The Easton Company in the original 1946 hearing proposed network programs for 63% of the time (R. 142). When the second hearing was ordered in 1950, provision was made for the amendment of the five-year old applications to bring them up to date (R. 47) and the parties were put on notice to disclose any and all changes in present plans (R. 129). Easton Company questioned the propriety of the provision for amendment of applications (R. 52) and chose deliberately not to amend its application as to program service (R. 160, 195). Easton Company's evidence in the 1951 hearing omitted any network program as well as any explanation as to its change of position between the two hearings. The witness for the Easton Company was examined on this evidence by Respondent's counsel, by FCC counsel and by the presiding officer, resulting in the admission that the Easton Company, if successful, would probably seek a network affiliation (R. 102-104). This admission contrasted with the network proposal in the original hearing left the Easton Company's 1951 radio proposal, at least 63% of it, uncertain. The evidence shows other relative uncertainties. Most of the so-called public service programs were not supported by testimony of representatives of any group that such groups would actually participate in the program proposals (R. 139). The evidence also bears out that to a substantial degree the Easton Company's program service of its FM station WEEX was at variance with the radio service proposals represented to the FCC for the grant of that licensee. Even taking the Easton Company's program evidence at face value, the FCC decision finds "Many of the local programs proposed to be broadcast by the Easton applicant are similar in a gen-

eral way to programs now broadcast by station WEST" (the existing AM broadcasting station in Easton) (R. 199, See R. 105-107).

Reluctance, evasiveness, and lack of candor. The trial examiner concluded " . . . there are serious questions with respect to the reliance which can be placed upon the management of the Easton applicant to operate the requested station in the manner represented, especially with respect to program service (R. 146). Elsewhere the trial examiner's Report with regard to the Easton Company's program evidence, states: "... the applicant has not made the frank, candid and honest disclosures on this and other subjects which the Commission has a right to expect of an applicant" (R. 143-144). The "several instances" of the Easton Company's witnesses' lack of candor and evasiveness were "considered separately and apart from the general context of the testimony" (R. 145) and in the aggregate deemed significantly substandard in forthrightness. *United States* v. *WOKO*, 329 U.S. 227 (1946).

No one can seriously contend today that in case adjudication proceedings no consideration will be given to demeanor evidence. This Court in *Universal Camera Case, supra,* quoted with approval from the Final Report of the Attorney General's Committee: " '. . . on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.' " Indeed it would be artificial and fictional to rule out the consideration of demeanor evidence in agency case proceedings. The vesting of judicial function in agencies conditioned upon the conduct of a case proceeding for the "reception of the evidence" must import from judicial experience the influence to be given demeanor evidence in the decisional process. Cf. *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (2d Cir., 1952);[10] *Morgan* v. *U. S.*, 298 U.S. 468, 481 (1936); *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484 (2d Cir., 1952). Demeanor evidence comes

into consideration only in the presence of the presiding officer and disappears when the witness steps down. The shifting of the hearing function from the agency to the trial examiner[11] necessarily carries with it the responsibility of considering and judging demeanor evidence. The court in *Dyer* v. *MacDougall, supra* stated:

> "He, who has seen and heard the 'demeanor' evidence, may have been right or wrong in thinking that it gave rational support to a verdict; yet, since that evidence has disappeared, it will be impossible for an appellate court to say which he was."

A cold hearing cannot recreate the actual hearing situation. It must be directly experienced. It cannot be simulated by the print of words on a page anymore than by the reproduction of characters in Braille. The search for truth is best left to him who directly experienced the actual hearing situation. "The voice is Jacob's voice, but the hands are the hands of Esau." No printed record could resolve that identity conflict.

---

[10] "It is true that the carriage, behavior, bearing, manner and appearance of a witness—in short his 'demeanor'—is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

[11] During the first 11 months of 1954, the FCC's trial examiners entered 68 Initial Decisions in broadcast cases (88 total). The FCC itself conducted no broadcast hearing and entered 10 contested decisions on review of trial examiner reports.

Monopoly and concentration of communications media. One of the more significant points of comparison between rival applicants is the issue of monopoly or competition. Radio broadcasting being a competitive activity, public interest is generally considered best served by preferring the application which tends to promote competition. With other factors being substantially equal, there is a somewhat consistent pattern of avoiding concentration of control in the same entity of mass media communications, particularly in the same community. *Scripps-Howard Radio, Inc.* v. *FCC*, 189 F. 2d 677 (1951). Easton Company is the owner and publisher of the only newspaper in Easton. It has survived two efforts of competition in this field (R. 165, 170). It is the licensee and operator of Easton's only TV station (which was authorized six months prior to the FCC's decision in this case). Since 1948 it has been the licensee and operator of FM radio station WEEX. Easton Company's only competition in Easton is from radio station WEST-FM/AM. A grant of the Easton Company's application would not promote competition but give it a facility for use in the only service in which it does not enjoy exclusivity. The evidence discloses various practices of the Easton Company which are restrictive and not up to licensee standards. Easton Company refused to publish the radio programs of the Easton station WEST from 1936 to 1948, a practice which was abandoned only after coming under FCC jurisdiction as the grantee of FM station WEEX. There is evidence that the Easton Company has continued to exclude or minimize publicizing activities otherwise newsworthy involving station WEST (R. 133). Published charges against the Easton Company that it would not print stories unless given a "beat" were left unexplained (R. 294).

The three factors above reviewed are considered in the lower Court's opinion not as findings which are *per se* unlawful but as illustrations of substantial evidence relied upon to unmask the erroneous FCC findings of equivalence between the relative abilities of Respondent and Easton

Company and between the comparative merits of their radio service proposals.

All of the above three factors pertain to *inter partes* matters on which Petitioner now contends the FCC made no findings and the lower Court's understanding to the contrary was mistaken. This contention would seem to remove the substantial evidence issue. In any event, the trial examiner's function on demeanor evidence in relation to the agency[12] is germane only to one of the above three factors and all are secondary to the question of substantial evidence. Cf. *Minneapolis-Honeywell Regulator Co.* v. *F.T.C.*, 191 F. 2d 786 (Cir. 7th 1951), cert. dismissed; *Boeing Airplane Co.* v. *N.L.R.B.*, — F. 2d — (9th Cir., Sept. 23, 1954), 4 Pike & Fischer, Ad. L. (2d) 575.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision below was correct, that no issue of general public significance appears, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Wash. 6, D. C.

December 17, 1954

[12] The lower Court's opinion is written by J. Bazelon who wrote the dissenting opinion in that Court's earlier decision in *Ramspeck* v. *Federal Trial Examiners Conference*, 202 F. 2d 312 (1952), Reversed, 345 U.S. 128.

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IN THE

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OCTOBER TERM, 1954

No. 451

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v.

ALLENTOWN BROADCASTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

DONALD C. BEELAR,
Attorney for
ALLENTOWN BROADCASTING CORPORATION

February 18, 1955.

IN THE

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OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Allentown Broadcasting Corporation submits the following reasons for withholding consent to the Easton Publishing Company's motion for leave to file a brief *amicus curiae* in this case.

Easton Publishing Company, a party to the proceeding before the FCC, was given statutory notice of the filing of the notice of appeal in this case (No. 11,957) but failed to intervene therein as provided by statute, 47 U.S.C.,

§ 402(e) (1952 ed.). The Easton Publishing Company's failure to intervene, whether "inadvertently" or otherwise, should be considered jurisdictional like failing to file a timely appeal. Such statutory procedure should not be subtended by resort to *amicus curiae* Rule 42. Allowance of the motion would obscure the distinction between a dilatory litigating-party and one truly *amicus curiae*. See *Clark* v. *Sandusky*, 205 F. 2d 915, 917 (7th Cir. 1953).

WHEREFORE, considering the above reasons and the irrelevancy of the matter tendered, it is urged that the motion be denied.

Respectfully submitted,

DONALD C. BEELAR,
Attorney for
ALLENTOWN BROADCASTING CORPORATION

February 18, 1955.

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BRIEF FOR ALLENTOWN BROADCASTING CORPORATION, RESPONDENT

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BRIEF FOR ALLENTOWN BROADCASTING CORPORATION, RESPONDENT

QUESTIONS PRESENTED

(1) Whether, on remand for comparative findings on the relative abilities of competing applicants for a new AM radio station, the Commission may abridge the statutory right of hearing to a single issue under Section 307(b) of the Communications Act, and award a permit, on a new interpretation thereof, solely because one of the two communities involved does not have a second local AM radio station.

(2) Whether the court below reasonably concluded that the record contained no substantial evidence to support a finding of comparative equality between the applicants where one applicant had an existing monopoly of com-

munications media, had presented an incomplete program proposal to the Commission, and had been found by the hearing examiner to be uncandid and evasive at the hearing.

3. Whether the Commission acted arbitrarily in rejecting its hearing officer's findings that the witnesses-in-chief of Respondent's rival applicant were evasive and lacking in candor and that their testimony was unreliable and lacking in credibility.

STATUTES INVOLVED

Sec. 307(a) and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. 307(a) and (b) (1952 ed.) provide as follows:

> "(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.
>
> "(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

Selected provisions of the Administrative Procedure Act and other provisions of the Communications Act of 1934, as amended, are included in Appendix A hereto.

STATEMENT

This case involves the assignment of a radio broadcasting station on the frequency of 1230 kc. either to Respondent for operation at Allentown, Pennsylvania, or to Easton Publishing Company for operation in the neighboring town

of Easton, Pennsylvania (R. 156). These applicants, Allentown Broadcasting Corporation and Easton Publishing Company, are referred to herein respectively as "Respondent" and "Easton Company".

The two applications involved in this proceeding were filed in the fall of 1945 and have been subjected to unduly prolonged agency proceedings. The evidence in the "combined record" of the original hearing in 1946 and the second hearing in 1951 became the basis of the agency decision which was reversed by the court below (R. 156, 54).* Most of the evidence considered herein is drawn from the findings of fact in the second hearing, including in particular those of the trial examiner's Initial Decision (R. 53-147).

The decision and record here under review are not dissociated from the several preceding agency decisions and appeal cases which have been rendered in this proceeding, as follows:

Citations	Date	Action
1. FCC Proposed Decision—Unreported (Tr. 1631).	April 28, 1947	Proposed grant of Respondent's application.
2. Original Decision 3 R. R. 1225 (R. 18-24).	June 23, 1947	Granted Respondent's application.
3. Rehearing Opinion 4 R. R. 176	March 25, 1948	Denied rehearing.
4. First Appeal Decision 175 F. 2d 344	May 4, 1949	Affirmed in part; remanded for findings.
5. FCC Second Hearing Order 6 R. R. 21 (R. 42-48)	February 20, 1950	Denied stipulations; ordered second hearing.
6. Mandamus Appeal 185 F. 2d 987	October 23, 1950	Denied writs to prohibit second hearing.
7. Initial Decision (R. 53-147)	June 11, 1952	Proposed grant of Respondent's application.
8. Second Hearing Decision 8 R. R. 31 (R. 156-216)	July 2, 1953	Denied Respondent's application and granted Easton Company's.
9. Rehearing Opinion 9 R. R. 887 (R. 237-263)	August 19, 1953	Denied rehearing.
10. Second Appeal Decision 10 R. R. 2086 (R. 315-332)	August 19, 1954	Reversed and remanded (certiorari granted).

* The FCC's record designation in the instant case includes the first hearing transcript of 1,821 pages and the second hearing transcript of some 3,280 additional pages.

The First Hearing Proceeding

The original hearing was a fully contested proceeding involving four applicants,* two seeking the assignment for Allentown and the other two for Easton (R. 53-54). This was a comparative proceeding on six specified issues (R. 54 n. 3) producing a record of 1,821 pages with some 64 exhibits and 1,122 pages of testimony, and resulting in a FCC determination favoring Respondent over any of the three rival applicants. The FCC conclusion in the original hearing of significance to the questions here presented is in part as follows (R. 24):

> "Upon consideration of the size of the two cities, the existing facilities of each and the amount of radio service available to each, we conclude that Allentown is in greater need of another radio station than Easton; that its need for another radio station is greater than Easton's need for extended services from its existing station, WEST; and that the purposes of Section 307(b) of the Communications Act would be better served by a grant to one of the Allentown applicants than by a grant to either of the Easton applicants."

The next following conclusion contains a detailed comparison between Respondent and the other Allentown applicant, resulting in a preference of the former, 3 R.R. 1235-36, (R. 24).

The First Appeal Decision

On appeal of the first FCC decision, *Easton Publishing Company* v. *FCC*, 175 F. 2d 344, 351, the court ordered—

> "The case must be remanded for findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need. *Upon the other points at issue, the conclusions of the Commission are affirmed.*" (italics added)

---

* By the time of the second hearing order, two of the applicants had dropped out, leaving only Respondent and the Easton Company.

The appeal issue which persuaded the court to remand the case for further findings was ". . . that the Commission should have made findings as to the service presently available to each community in terms of radio programs." The precise deficiency in the Commission's findings was expressed by the court as follows (175 F. 2d at 349):

> "The record contained evidence upon the programs. The Commission made findings as to the composition and character of the program proposals of the two applicants. But it gave no indication of their comparative qualities, or of the lack of any particular type of service in either community, or of the greater ability of either applicant to meet that need."

The court viewed the case as one involving ". . . a comparative consideration of two communities and of two applicants" and stated the interrelation of the two considerations as follows (175 F. 2d at 346-7):

> "If there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements, of the applicant to render service are immaterial. But, if a choice must be made between two qualified applicants, the problem has a different aspect. And, if a choice must be made between two communities, still further considerations are involved.
>
> * * *
>
> "If an applicant has not the bare minimum qualifications for a license, no great harm is done by its denial. But a choice between two well-qualified applicants necessarily means a substantial economic denial as well as an economic award. And, in respect to competing communities, the award means denial to one as it means advantage to the other."

Second Hearing Order

In June 1949, the month following the first appeal decision, the three applicants then remaining in the case filed a joint motion and stipulation (R. 30-31) which was shortly

followed by the separate filing of petitions for supplemental findings (R. 32-41). With these further submissions both Respondent and the Easton Company concluded their cases on the open-ended issue of the remand judgment.

The following February (1950) the Commission, instead of further deciding the case as submitted by the parties, issued an Order which (a) rejected the joint stipulation, (b) set aside the original decision which had been affirmed in part, (c) reopened the original hearing record, designating the applications for further hearing upon eight specified issues, and (d) provided twenty days for amendment of applications to bring them up to date (R. 42-48).*

Thereafter, Easton Company on March 17, 1950, filed in the court below a motio.. for writ of prohibition and mandamus ". . . to prevent the Commission from reopening the case and holding a further hearing and to require it to make findings on the original record . . ." including the joint stipulation. Respondent joined in this effort by filing on March 23, 1950, a motion for leave to file a petition for writ of mandamus. The court denied these petitions, holding that such writs could not be substituted for the statutory appeal ". . . from a denial of an application . . .", and that the matters stated in the pleadings were considered to have ". . . no validity as against the *power* of the Commission to hold the further hearing upon the issues above specified." *Easton Publishing Company* v. *FCC*, 185 F. 2d 987, 991.

The efforts of both applicants to bring this case to a conclusion were blocked, leaving no choice except to undergo a second full hearing or default.

The Initial Decision

The Commission's trial examiner who conducted the second hearing proceeding released an Initial Decision on June 11, 1952, proposing a grant of Respondent's applica-

---

* Second Hearing Order also authorized Respondent's station WHOL to continue operation pending hearing and final decision. (See page 10, *infra*).

tion. This was predicated upon detailed evidentiary findings addressed to the hearing issues in the case (R. 57) and the remand issue of the first appeal decision (R. 56).

On the inter-community issue, the trial examiner concluded (R. 145):

> "This is not a case in which a city is without local broadcast transmitting facilities nor is it a case where a choice of programs is not available to the residents of both cities. The mere fact that there are three stations in one city and one station in the other is not controlling in reaching a determination on the comparative needs of the two communities."

On consideration of the issue of relative applicant abilities, the trial examiner concluded that the testimonial evidence of the Easton Company's witnesses was unreliable (R. 146) and that the evidence was insufficient to disclose ". . . with the required certainty the program services which would be rendered by the proposed station at Easton . . ." (R. 143).

Further, upon a comparative consideration of the applicants and their respective service proposals (R. 127), the trial examiner concluded (R. 147):

> ". . . that a more fair, efficient and equitable distribution of radio facilities would be attained and public interest, convenience and necessity better served by the grant of the Allentown Broadcasting Corporation application . . ."

The Second FCC Decision

Under the Commission's procedure for the review of initial decisions, exceptions were filed and oral arguments were held before the Commission February 24, 1953. The Commission's decision here under review was rendered July 2, 1953, reversing the trial examiner and ordering a denial of Respondent's application and a grant of Easton Company's. This decision was entered with two Commissioners not participating and one dissenting (R. 156).

The Commission concluded that ". . . there is little room for choice between the two communities." It awarded the station to Easton to give that community two standard broadcast stations and a resulting "choice of service", which was presently available to Allentown from its three stations. This was held to be the "one decisive factor" (R. 211).

The Commission ". . . rejected the conclusion of the Hearing Examiner that the record does not disclose with the 'required certainty' the program service which would be rendered by the Easton applicant . . ." (R. 214). The Commission set aside the findings of the trial examiner holding oral testimony of the Easton Company witnesses lacking in credibility (R. 205).* This reversal of the hearing officer's conclusion on demeanor evidence was stated to be on the ground that it was based on "testimony by one witness" rather than a judgment of "different witnesses who make contradictory statements" (R. 205).

The Commission's decision is pivoted on the so-called choice-of-local-AM-service holding. It did *not* rule that the issue of comparative applicant abilities is immaterial, but neither did it contain any ultimate findings which are sufficient or adequate on this issue.

The Commission's 1953 decision details no consideration relied upon for reversing its order in the first hearing decision, excepting only that attributable to the comparison that "Allentown is presently served by three standard broadcast stations . . ." whereas ". . . only one standard broadcast station is located in . . . the Easton community" (R. 211-12). Such a comparison takes into account against Respondent the fact that station WKAP is operating full-

* The Commission's ruling, following reference to the *Universal Camera Case*, (340 U.S. 474) was as follows (R. 260-61):

> "However, nothing in that case nor any of the decisions or statutes with which we are familiar deprives this Commission of its responsibility for making its own independent evaluation of the evidence of record upon which material conclusions of this nature are based."

time in Allentown (R. 191) as a result of an intervening 1950 grant, as to which Respondent was held to have no standing (R. 311). On the other hand, although the Commission's decision takes note of its December 1952 grant of a television station to the Easton Company for operation in Easton (R. 165), it gives no consideration to this authorization on the issue of the distribution of "radio service" between the two communities (R. 213, 260).*

The Second Appeal Decision

The court below reversed the Commission's decision and remanded the case for redetermination (in accordance with newly enacted Sec. 402(h)). The remand required that ". . . the Commission must re-evaluate the effect of the Easton Company's news monopoly and its past conduct on the issue of the relative abilities of the two applicants to serve in the public interest" (R. 322). The court's holding, addressed to the issue of comparative applicant abilities, was that the Commission's findings of substantial equivalence on this issue were deficient, unsupported by and contrary to substantial evidence. The opinion states ". . . we think there is no substantial evidence in the record as a whole—including the Hearing Examiner's Initial Decision —to support the essential underlying findings that the ability of the applicants to serve their respective communities was about equal" (R. 317-18). This is the issue on which the Commission's decision was reversed.

The questions here presented raise a doubt as to whether the Commission *did* make findings on the issue of comparative applicant abilities, as held deficient by the court below, or whether the Commission *did not* make findings on such issue at all, as now contended by the Government.

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* "While television is of course an important medium of mass communications the existence or lack of existence of this visual media can hardly be determinative of which of two communities is most in need of an additional standard broadcast facility to provide aural broadcast service" (R. 260).

Circumstances of the Operation of Respondent's Station

A station construction permit was issued to Respondent after the original hearing decision (R. 25). Under this authorization Respondent's station WHOL was constructed and placed in service September 3, 1948. It has been in continuous service since that date. A regular license was issued to Respondent February 2, 1949 (R. 27-30). An application for renewal of license was filed on October 30, 1951 (R. 149) and is still pending. The outstanding authorization to Respondent allows operation of station WHOL pending final decision in this case (R. 48, 159).

SUMMARY OF ARGUMENT

I.

Although the earlier decision of the court below, which the Commission did not seek to review, specifically directed it to make comparative findings on the relative abilities of the two applicants, the Commission now belatedly seeks to evade this directive by contriving a novel statutory interpretation presumed to govern this case. In its current view, the Commission maintains that the single "decisive factor" impelling a grant to the Easton Company was the absence of a second *AM radio* broadcast station in Easton, and that no comparison of the relative abilities of the applicants was necessary or proper. Such a contention, if upheld, would arbitrarily deprive competing applicants for a new station in one of two neighboring communities of the full hearing, on all relevant issues urged, to which they are entitled by the provisions of the Communications Act, and deprive the public of the benefit of the agency's expert judgment in licensing the better qualified applicant when a choice is possible.

Section 307(b) of the Communications Act, directing the Commission to make a fair distribution of radio service throughout the nation, may be a comparative factor of persuasive force in certain situations, but under no cir-

cumstances should be applied so as to exclude other standard comparative issues between competing applicants for the same facilities. Nothing in the legislative history of this section indicates that it must be interpreted arbitrarily to the exclusion of other factors. If the Commission's novel principal contention were correct, the adjudication of contested applications for the same facilities in neighboring communities would become an empty administrative formula, with the Commission's statutory duty to hear and decide cases on the evidence abandoned in favor of an arbitrary rule of thumb. Such a formula would give an unprecedented importance to a provision of the Communications Act which is properly of little significance in the present advanced state of the standard broadcast industry.

Moreover, the Commission's extension of Section 307(b) to the facts of the present case is in any event an unjustified and arbitrary application of that provision. The two communities involved here are relatively closely balanced in their need for an additional broadcast service, and, if anything, Respondent's community, in terms of present population, rate of growth, and existing broadcast service, is somewhat more deserving of a new facility than Easton. The Commission's arbitrary preference of Easton because it now has only one AM radio broadcast station (although it enjoys a multiplicity of broadcast services above the national average for comparable cities) is unprecedented, with one possible exception, in Commission and court authority and is contrary to previous agency and court decisions.

II.

The court below reasonably and properly concluded that the Commission's decision was devoid of substantial evidence in the record to support a finding of approximate equality between the applicants. The court's conclusion was based on three areas where the record indicates the comparative superiority of Respondent, all of which were either totally ignored or minimized in the Commission's

decision. Militating against any finding of comparative equality between Easton Company and Respondent are the facts that a grant to Easton will augment and consolidate the Easton Company's existing concentration of control of the mass media of expression in Easton, and may be used unfairly to extend that monopoly; that as a result of tainted testimony by its principals, the Easton Company's program proposal is shrouded in uncertainty; and, finally, that the Easton Company in its conduct before the Commission and the trial examiner has not displayed the forthrightness which may properly be expected of candidates for broadcast licenses.

In addition to the areas chosen by the court below to illustrate the need of reversal for inadequate findings and a remand for further consideration by the Commission, other comparative differences between the applicants appear in the record on which no findings were made sufficient to support or justify a conclusion that the parties are equally entitled to the facilities sought.

III.

The court below properly reversed the Commission's unwarranted rejection of its examiner's conclusion, based on her observation of the demeanor of Easton Company witnesses, that they betrayed an attitude and gave an impression of evasiveness and lack of candor. The court properly held that these findings by the examiner on the lack of credibility of the Easton Company witnesses, based on their demeanor during oral testimony, should not have been rejected by the Commission reviewing the cold record of the hearing in the absence of compelling recorded evidence to the contrary.

Moreover, the court's emphasis on the weight which must be accorded by agencies to findings based on demeanor of witnesses by a trial examiner is peculiarly appropriate in the case of the Federal Communications Commission. By recent enactment, Congress has vested in the trial examiners of the FCC enhanced responsibility

for finding the facts and limited the role of the Commission itself largely to that of reviewing the ultimate policy and legal questions arising from the facts as found.

I

THE STATUTORY RIGHT OF HEARING ON COMPARATIVE ISSUES BETWEEN RIVAL APPLICANTS MAY NOT BE ABRIDGED TO A SECTION 307(b) ISSUE ONLY

In joining issue with the first contention* in the Government's brief we would emphasize that the question is not one of abstract statutory interpretation, administratively applied, but rather one of the function of a Section 307(b) question in a comparative case proceeding between rival applicants determined upon evidence in a statutory hearing proceeding.

Under FCC practice, the usual case proceeding on comparative issues is one which involves a choice of one of competing applicants for the same assignment. Such a proceeding brings forth an interplay of claims of superiority which comparatively weighed entitles one applicant to be preferred over the other. These claims to preference may be divided broadly into three groupings: (a) background and experience of the applicants; (b) plans for management and operation of the station; and (c) detail of program proposals and services.** A comparative pro-

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* It is Respondent's position that the Government's first contention, i.e. that Sec. 307(b) is independently controlling, was not raised or decided by the court below, and hence should not be considered here. *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 468; *Owens* v. *Union Pacific R. Co.*, 319 U.S. 715, 724-725, *Helvering* v. *Cement Investors, Inc.*, 316 U.S. 527, 535; *Helvering* v. *Wood*, 309 U.S. 344, 348-349.

** A comparative proceeding normally presumes that each applicant is basically qualified, legally, financially and technically. This may be administratively determined by the Commission. Sec. 309(b). *FCC Annual Report, 1953* states, p. 108: "In addition, findings are now made on the basic qualifications of the applicants (legal, financial, technical, etc.) before designating them for hearing on comparative qualifications. In most instances this has eliminated lengthy testimony on matters upon which no actual controversy exists."

ceeding normally presumes that both applications could be granted except for their mutual exclusivity which makes necessary a choice as to which grant will *better* serve public interest, convenience or necessity.

This description of a "comparative case proceeding" should be acceptable as applied to those cases where the contested assignment is sought for the *same* community.

In a case where the applicants are competing for an assignment to be used in *different* communities, there is brought into play the additional Section 307(b) issue. Under FCC practice and in all such case proceedings to our knowledge, including the one at bar, the hearing issues specified by the Commission have embraced without distinction all questions of comparative applicant and service considerations and the additional inter-community issue. In no case to our knowledge has there been any practice or attempt to sever or isolate a Section 307(b) question from the other comparative hearing issues.

The Government is here contending for an interpretation of Section 307(b) which would rule out issues of comparative consideration between applicants and their service proposals and restrict a case determination to the sole question of the fair distribution of radio facilities between communities. To this extent, the right of hearing accorded applicants in FCC comparative case proceedings would be abridged.

A. The Interpretation Advanced Would Not Be Controlling in This Case

It is unrealistic to contend that the presence of a Section 307(b) question in a case makes that issue independently controlling. The practical circumstances are that an adjudication of a Section 307(b) issue admits of three possible results: Situation One, Section 307(b) is the dominant factor; Situation Two, Section 307(b) is a significant factor but outweighed by others; or, Situation Three, the Section 307(b) issue is of no significance. For example,—

Situation One. Assume Community A and Community B, equal in population, have equal services from distant stations and are otherwise equivalent, except that Community A has one local broadcast station and Community B has none. The requirement of equitable distribution may reasonably be the dominant factor notwithstanding the superiority of the Community A applicant on other comparative considerations.* However, even in such a case the FCC is disabled by the Act from making a determination in favor of Community B administratively. Sec. 309(b) and (c). To illustrate, in this case Respondent originally applied for the second station in Allentown, which was three times the size of Easton. Easton also had one station and as much service from outside stations as Allentown. Nevertheless, the case went to hearing on full scale comparative issues.

Situation Two. Assume the Community A and Community B circumstances as above stated except that Community A has one full-time station and Community B has one daytime only station. In this case, with other factors substantially equal, Section 307(b) may balance in favor of Community B. Suppose, however, the Community B applicant is a non-resident or has failed to show a "high

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* Cf. *Metropolitan Broadcasting Company*, 5 R.R. 532, cited by the Petitioner (Brief, p. 30), where the Commission was faced with a choice between giving a new standard broadcast station to San Antonio, Texas, which already had *eight*, or to Alamo Heights, which had *none*. Similarly, in the *Radio Cincinnati* case, relied upon heavily by Petitioner, the decisive importance given to Section 307(b) was based upon the fact that the favored applicant would bring a *first* daytime broadcast service to some 5000 persons in an area of 550 square miles. The court below regarded this difference (not present in this case) as "of vital significance" in affirming the Commission's decision (177 F. 2d 92, 95). This case was unique on its facts since the Commission had proposed a grant of both applications with a condition that the Cincinnati applicant construct a directional antenna. Refusal of this engineering condition resulted in the dispute.

sense of public responsibility",* whereas the Community A applicant on these counts was clearly superior. Community A may reasonably be preferred despite the Section 307(b) preference to Community B.

Situation Three. Make the same fact assumptions as to Community A and Community B except that each one has one full-time station with the same power and otherwise equal. In such case the practical necessity and requirement of the statute compel a determination of the case on other issues notwithstanding that two communities are involved.**

The third situation is illustrated by the following FCC decisions: *In re Southeastern Massachusetts Broadcasting Corp.*, 12 F.C.C. 363, 371:

> "Comparison of the populations of the respective cities, the nature of existing stations located in the communities and other broadcast signals and program services available to the cities would indicate a slight preference for New Bedford, while considerations of the most efficient use of the frequency indicates a preference for Fall River. Under these circumstances, in our opinion, the requirements of section 307(b) for a fair, efficient, and equitable distribution of radio facilities appear to be so closely balanced as not to warrant a clear preference of one city over the other. Accordingly, our determination has been predicated upon considerations other than those arising from section 307(b) of the act."

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* See *FCC Sixteenth Annual Report*, 1950, p. 99:

"Broadcast stations are licensed to serve 'the public interest, convenience and necessity.' Because radio channels are limited and are a part of the public domain, it is important that they be entrusted to licensees who have a high sense of public responsibility."

** Similarly, Section 307(b) will not apply at all where the two applicants, although technically applying for different communities, will actually serve a common larger area. This was the case in *Huntington Broadcasting Company* v. *FCC*, 192 F. 2d 33, cited by Petitioner (Brief, p. 30).

In re Metropolitan Broadcasting Corp., 12 F.C.C. 601, 607:

> "In view of the foregoing considerations, we conclude that the requirements of section 307(b) of a 'fair, efficient, and equitable distribution of radio service' are balanced to such an extent that no clear preference can be made under this section in favor of one of the two applicants in this proceeding. Hence, we must make a choice in this proceeding by a comparison of other merits of the two applications before us."

The interpretation here advanced by the Government that Section 307(b) is necessarily controlling in this case is not warranted on the record here under review. The trial examiner's finding on the Section 307(b) issue was ". . . that a more fair, efficient and equitable distribution of radio facilities would be attained and public interest, convenience and necessity better served by the grant of the Allentown Broadcasting Corporation application." In the Commission's decision the finding on this issue is that ". . . there is little room for choice between the two communities." It is Respondent's contention that, viewed most favorably to Petitioner, Section 307(b) in this case is not of any substantial significance and isolated from other issues does not compel or prevent a grant of either application on the evidence and findings of record. This case is within the third situation above described and analogous to the above cited case decisions.

B. The Government's Interpretation of Section 307(b) Is Unwarranted

The interpretation here advanced by the Government is unprecedented. No FCC case or appeal decision to our knowledge holds that the presence of a Section 307(b) issue in a comparative FCC proceeding renders other issues immaterial. Such an interpretation lacks any legislative support.

The hearing issues specified in the case at bar, other than Section 307(b), were not ruled immaterial in the Commission's decision. The decision of the Court below only

serves to emphasize the materiality of non-Section 307(b) issues, and *on this point there is no difference between the majority and minority opinions.*

The Commission interpretation is decidedly abstract. If there is to be a severance of the Section 307(b) issue from those germane to the public interest, convenience or necessity, we are not told what criteria are to be included or excluded. We are not given any detail of the scope or limitations of such interpretation. We are not told how the administration will be changed. We are not given the procedural modifications of such a single-issue adjudication. It is all too vague.

If such a FCC case proceeding is to be a one-dimensional affair, we need to examine the terms of Section 307(b). The objective sought is an "*equitable distribution of radio service.*" This objective is to be achieved by "*distribution of licenses, frequencies and of power.*" The areas of distribution of such facilities and of such "radio service" are "among the several states and communities." None of these terms (except "license") is defined by the Act (Sec. 3). Section 307(b) is not clarified by any implementing rules of the Commission.*

Legislative History. Section 307(b) has not been considered by Congress since its amendment in 1936, 49 Stat. 1475, and the intent of this amendment was merely to restore the original provision (Sec. 9) of the Radio Act of 1927, 44 Stat. 1166. Explanation of the 1936 amendment was given succinctly in Congressional debates as follows (80 Cong. Rec. 6032):

> "Mr. King. What is the purpose of the bill?
> "Mr. Wheeler. The purpose is to restore the provisions of the original act.

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* Rule 3.24 of the Commission's Rules requires each applicant for broadcasting facilities to make a satisfactory showing on eight items including Sec. 307(b). 47 CFR 3.24.

"The original act contained practically the same provisions as the bill in question."*

Congress in 1952 rather generously overhauled the Communications Act of 1934 by passage, after a decade of consideration, of the McFarland Act, entitled "Communications Act Amendments, 1952," 66 Stat. 711 *et seq.* No revision was made in Section 307(b). The "legislative age" of "equitable distribution" of radio service is 1927.

From the original provision in the 1927 Act (44 Stat. 1166) through the Davis amendment of 1928 specifying a zone-state quota system (45 Stat. 373), through the later exemption therefrom in 1934 of low power local stations (48 Stat. 1083), to the return in 1936 to the original language (49 Stat. 1475), there appears a general intention of assuring a fair distribution of "radio service" to all states and population centers of the United States. The main thrust of this legislation in each of its three forms was to allay fears of Congress that a federal agency might discriminate against any state or section, particularly

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* The original language of the 1927 Act provided:

"... the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different states and communities as to give fair, efficient, and equitable radio service to each of the same." 44 Stat. 1166.

The Radio Act of 1927, Sec. 2, 44 Stat. 1162, divided the country into five zones. House Report No. 404, 69th Cong., in explaining these zones, stated:

"The bill creates within the United States five zones *of approximately equal population.* (italics added)

It was these zones, *created according to population*, which later became the basis for the Davis amendment (45 Stat. 373):

"Sec. 9 ... the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service ... and ... the licensing authority ... shall make a fair and equitable allocation of licenses ... *according to population.*" (italics added)

The *equal-population zones* were *unequal in areas, unequal in the number of states and number of communities* within each zone.

western states. It was a manifestation of the rights of states in the evolution of a new medium to seek equality in radio service.

The principal effect of the 1936 amendment was to release the Commission from the strait jacket imposed by the arbitrary zone and state quota system, and to de-emphasize the undue attention given to the facility aspect in contrast to the "radio service" aspect. This 1936 change again subordinated "equitable distribution," facilities or service, to the broad standard of public interest, convenience or necessity.

An illuminating exposition of this subject is given in the 1930 *Report of the American Bar Association's* standing *Committee on Communications*. Chairmanned by the late Louis G. Caldwell, the first General Counsel of the Federal Radio Commission. 55 A.B.A. Rep. 350, 372-380. The Report comments on the original provision as follows:

> "The Radio Act of 1927, as originally drafted and passed, covered the subject of geographical distribution of broadcasting stations in ideal fashion. After prescribing that the licensing authority should be guided in its actions by the standard of 'public interest, convenience or necessity,' it directed that 'the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.'
>
> "Even if this direction had not been incorporated in the act, a proper interpretation of 'public interest, convenience or necessity,' in the light of the purpose of the act, would necessarily have implied an equitable geographical distribution of broadcasting stations."

This ABA Report of 1930 recommended a "return to the original language," which is the solution eventually adopted by Congress in 1936 and which remains in effect today. Without detailing the legislative history on this subject, we are satisfied that Section 307(b) means nothing

more or less than that clearly indicated by the ordinary meaning of its terms, and that it was intended, not to give rise to arbitrary action, but as a guide to the proper application of the broader standard of public interest, convenience or necessity, aptly characterized as the "touchstone" of this Congressional delegation. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216. See *F.R.C.* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266.

With the possible exception of the Davis amendment, repealed in 1936, we can find no indication of any legislative intention from 1927 to date that Section 307(b) was to be an "overriding mandate" in adjudicating radio case proceedings.

C. Proposed Interpretation would Result in Arbitrary Procedures

If the Commission's newly found interpretation of Section 307(b) were adopted, we are not told how the handling of FCC case proceedings would be consequentially restricted. We are not given any suggestion as to the resulting procedural revisions. If a case proceeding involving two communities is to be limited to their respective needs in terms of the provision of Section 307(b), what factual showing would be germane to this single issue?

The following factors would seem material to such a Section 307(b) case (assuming a Section 309(b) administrative determination of applicant minimum financial, legal and technical qualifications):

a. *Population*, e.g., the comparative size of the two communities. Should a community twice the size be granted twice the facilities?

b. *Population to be Served.* What population actually resides within the good service contour of each station?

c. *Average Population-per-Station.* Considering a division of the available population audience equally among the available local transmitting channels, what is the average population per station?

d. *Radio Service-Local Stations.* What is the number of stations which originates programs in the community?

e. *Radio-Service-Reception.* What is the number of signals available in the community for good service from stations operating in other states or communities?

f. *Efficiency.* What are the comparative interference considerations; the ability of the proposed station to give complete coverage to the community; initial service to areas receiving no signal, etc.

The above factors may be applied in a comparison between the two communities involved; or, they may be projected horizontally to a nation-wide comparison of other communities similar to those in issue. If the comparison involves different states, we are not told how Section 307(b) factors would be considered in terms of the total facilities and total radio service of each state or what considerations other than population and area would determine a fair distribution between them. We are not told how community comparisons will foster radio service to rural areas.

Commonly considered factors at issue in other comparative proceedings, not germane to Section 307(b), include the following: (a) relative applicant qualifications, (b) diversification of control over communications media, (c) local residence and ownership, (d) civic activities and awareness of community responsibilities, (e) programming and operating plans, (f) past experience, (g) monopolistic practices, (h) integration of ownership and management, etc. See 2 R.R. 1451 and p. 13, *supra.* The Government's interpretation would discharge the Commission from any responsibility to consider such public interest factors in any case proceeding which involved assignment to one of two communities. In any such two-community case, the FCC would make no attempt to determine which grant would better serve the public interest.

A hearing proceeding limited to a factual showing material to the terms of Section 307(b) would hardly be a

hearing at all. *Population* and census data may be officially noticed or stipulated. *Population Served* is a matter of routine engineering computation of the service contours of the station and tabulation of the population distribution therein. *Local Stations* involves merely a transmitter count from the trade publications or FCC license files. *Receivable Signals* available to a community from stations in other communities may be established by office computations or field measurements. Such data is quite routine and not normally a matter of dispute. *Efficiency* in terms of frequency or power is a question which has separate significance under FCC Standards of Good Engineering and is usually included with the application and passed upon in most instances administratively. Evidence on these matters is not normally contested between applicants.

Any of such formal facts can be administratively determined by the Commission from the application and other data and may be eliminated from the issues specified in the pre-hearing notice under Section 309(b). Adoption of the Government's interpretation would have the effect of empowering the Commission to determine administratively all facts which it would consider material to a Section 307(b) determination. For example, in the instant case what the Commission states as the "one decisive factor" is that Easton has only one AM station. Ascertainment of this fact would not warrant a hearing, much less one of ten years duration and an "involuntary" complete second hearing.

If an FCC proceeding on contested applications may be confined to a Section 307(b) issue only, the effect will be to deny the right of hearing in such cases. Such arbitrary constriction or denial of hearing would be contrary to the Congressional intention stated in Section 309(b) that any hearing "shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate." This expression, read in conjunction with the protest procedure permitted under subsection (c), requires and permits those hearing issues which will embrace a full

hearing and an adjudication of the claims of all parties in interest. FCC practice recognizes the right of parties to add issues in addition to those specified by the Commission. Rule 1.389. Such right would be foreclosed by an interpretation confining a case to the single Section 307(b) issue.

FCC rules of practice contain no provision giving support for the present contention that a comparative proceeding which involves two communities is limited to a Section 307(b) issue. There is no procedure for the severance of the Section 307(b) issue from other customarily considered comparative issues or for the trial in successive stages of the 307(b) issue, and if that is not decisive, the other specified issues. No such procedures presently exist.

The effort being made in this case to constrict the right of hearing is similar in purpose and effect to two previous efforts which were upset in *FCC* v. *National Broadcasting Co.*, 319 U.S. 239, and *Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327. In the *NBC* case, *supra*, station KOA in Denver was denied a hearing by the FCC despite electrical interference to its authorized service resulting from the grant of a license to a Boston station to operate nighttime on the frequency used by KOA as a clear channel station. The denial was held to be reversible error. In the *Ashbacker* case, the Commission administratively granted one of two mutually exclusive applications for the same assignment in two Michigan communities, Grand Rapids or Muskegon, and designated the unsuccessful application for hearing on comparative issues. The denial of a right of hearing prior to an adjudication of the hearing issues involved was held to be reversible error. This decision interpreted the Act as granting applicants a full right to a comparative hearing even though two different communities are involved.

D. Section 307(b) is Seldom of Any Significance in Present-Day FCC Broadcast Cases

No one will seriously question the objective of equality in radio broadcasting service. That is not the point in issue here. Rather, the question is, of what present-day significance is Section 307(b) in the further evolution of radio broadcasting services?

In the standard broadcast band (540-1600 kc.) there are presently assigned in the United States 2,697 AM stations. Whatever degree of equality there may be in this class of radio service is a *fait accompli*. During fiscal year 1954, there was a net increase in standard (AM) broadcast stations of 113. "Most of the new grants were for local low-powered day-time only stations." *FCC's 20th Annual Report, 1954*, p. 6.

Assignment of television stations has been the principal activity of the Commission in the broadcast field since 1952. There are 603 TV assignments. However, the possibility of a Section 307(b) issue in a television case proceeding is all but nil. Television assignments have been allocated to communities under a nation-wide plan.* This plan includes "A Table of Assignments" which allocates discrete frequencies to named cities, 47 CFR 3.606. Thus, in the case of television radio service, whatever order of Section 307(b) equality may exist, it was largely formalized in April 1952. Rule 3.607 of the Commission's Rules, 47 CFR 3.607, provides in part:

> ". . . applications may be filed to construct television broadcast stations only on the channels assigned in the Table of Assignments and only in the communities listed therein."

Frequency modulation (FM) broadcasting stations, 88-108 mc., total 569. There was a net reduction of 32 in the number of this class station during fiscal year 1954. FM

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* Such master plan, promulgated as a rule, was upheld in *Peoples Broadcasting Co.* v. *United States*, 209 F. 2d 286; and in *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24.

broadcast assignments, somewhat similar to television, were predicated upon a nation-wide allocation plan. *FCC 12th Annual Report*, 1946, p. 16.

Of the three major classes of radio broadcasting services, television, frequency modulation and standard AM broadcasting, a Section 307(b) hearing issue, for all practical purposes, is possible only in case proceedings on AM applications. The existence of a Section 307(b) issue in an AM case proceeding is most infrequent. All but a fraction of AM station authorizations are granted without a hearing in which case no consideration is given to any Section 307(b) question. A Section 307(b) issue would arise only when specified in a FCC hearing notice issued under Section 309(b). For example, during fiscal year 1954, the Commission granted 142 AM authorizations. During the same period, the FCC entered only 6 initial or final decisions in contested AM broadcast cases. None of these cases involved a Section 307(b) issue. The possibility of a Section 307(b) issue, with minor exceptions of no particular significance, can arise only in the case of mutually exclusive applications for an AM station in different communities. For example, the Commission in its brief (p. 22) before the court below in this case argued:

> "The necessity for considering the needs of the two communities here arose solely from the fact that only one of them could be awarded an additional station in this proceeding. If WKAP's application were before the Commission today (and there were no mutually exclusive applications), it could be granted, as it was in 1950, without any regard for the number of other stations in either Allentown or in Easton."

The Commission's current annual report to Congress, a 20th anniversary highlight, makes no mention of the distribution of broadcast facilities or of any Section 307(b) problem. The Commission's 4th and 5th Annual Reports to Congress, in 1938 and 1939, do contain detailed information, statistics and tables on "distribution of broadcast facilities" (p. 50, p. 36, resp.) but the main emphasis in

these studies, which began in 1935, was on service to rural listeners, *FCC 1st Annual Report, 1935*, p. 31. Annual Reports of the Commission during following years did publish statistical data on "broadcast distribution," but apparently even this was discontinued in 1950. *FCC 16th Annual Report*, p. 115-117.

During the ten-year period preceding 1952, Congressional hearings were held upon various bills to amend the Communications Act of 1934 which culminated in adoption of the McFarland Act on July 16, 1952, 66 Stat. 711. The Congressional reports on this extended legislation dealt with many subjects of current concern, but not the problem of equitable distribution of radio service or Section 307(b).

E. Choice-of-Local-AM-Transmission-Service is an Arbitrary and Unwarranted Ground of Decision in This Case

The Commission's decision in this case is based on the simple fact that Easton has only one AM station. The reasoning is that in a case proceeding involving a choice between two communities, that community which has only one standard broadcast station is to be preferred. This preference is to be given the one-AM-station-community without any regard to the comparative merits of the applicants or their service proposals, or even the Section 307(b) factors outlined *supra*, pp. 21-22.

If this were a proper rule of law, the effect would be to restrict the right of hearing to a simple fact, *i.e.*, has the smaller community but one AM station? If this is to be a proper ground for decision regardless of other significant factors, then Respondent's case was non-suited at that point in this ten-year proceeding when the Commission granted a second radio station to Allentown. Any such rule is patently arbitrary. It would reduce the Commission's function to that of counting transmitters, would completely defeat any comparative consideration and would circumvent the expressed requirement of the Act that FCC decisions shall include findings and the basis therefor "upon all material issues," Section 409(b).

The Commission's new-found proposition of a "choice of local service" carries an implication, at least partially, that Easton is lacking in a choice of "radio service." By no standard of comparison can Easton be regarded as an "underserved community."

Radio service, the term used in Section 307(b), as applied to "broadcasting" means "the dissemination of radio communications intended to be received by the public, . . . ", Section 3(o). The Commission's most recent Annual Report to Congress which included data on "broadcast distribution," states as follows (FCC Annual Report, 1950, p. 115):

> "The more than 3,100 authorized commercial AM, FM, and TV broadcast stations at the close of the fiscal year were distributed throughout nearly 1,300 communities in the United States and its possessions. All but 20 of these communities had at least one authorized AM station. The remaining 20 communities had FM authorizations only. A total of 384 communities had one or more authorized FM stations, and 66 cities had TV authorizations."*

Easton now has four local radio broadcasting services: one AM radio station (WEST), two FM radio stations (WEEX and WEST/FM), and one TV station (WGLV) (R. 188). Easton and the Easton area receive radio services from a number of standard broadcast stations operating in other communities. Station WOR, New York City, serves Easton day and night. At least nine radio stations furnish service to varying portions of the area which would be served by the proposed Easton Company station. Daytime service is rendered to all of the Easton rural area by five stations; to 90% of the area by two additional

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* The FCC Annual Report, 1954, at p. 109 states there are nine million FM radio receiving sets in use and thirty million television sets of which four million can get the UHF channels. Easton Company's advertisement in the 1953 Telecasting Yearbook-Marketbook (published August 17, 1953) on its new television station WGLV gives the number of UHF television sets in the Easton area as 24,600.

stations; to 70% of the area by two additional stations; 50% of the area by four additional stations; 40% by one station; and nine other stations serve under 40% of Easton's rural area. At night five stations provide primary service to all of the rural area in the Easton vicinity. (R. 190)* Easton community does receive a choice of local FM radio broadcasting service. (R. 188)

A comparison of Easton with other communities of the United States in the same population bracket, and outside of metropolitan areas or adjacent to large cities, disproves any assumption that Easton is underserved.

Appendix B lists the broadcast facilities assigned to 37 communities comparable to Easton. The communities used as a base of comparison are taken from a list of cities published in the 5th FCC Annual Report, 1939, having in excess of 25,000 population and *no local broadcast service.*** The 1950 census of these cities varies from 27,000 to 78,000. and averages about 40,000 or 4,000 in excess of Easton. Two of these cities have no AM station: twenty-four out of the 35 remaining cities have only one AM station. Less than one out of three has an FM radio station or a TV radio station. Of these 37 communities the average of broadcasting facilities, AM, FM and TV, is 1.8. Easton, in contrast, has *four* radio broadcasting facilities.

A parallel comparison between Allentown and other comparable cities supports the additional assignment to Respondent. Appendix C lists 20 cities in the general population bracket of Allentown and outside of larger metropolitan areas and shows the AM, FM and TV assignment to each. Five of these cities have six AM stations; four have five AM stations; and two have four AM stations. The average is 4.1 AM stations, 1 FM station and 1.3 TV

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* The record does not show television service received in Easton from stations in other communities, or radio service received from other FM radio stations.

** The total number was 133. Appendix B excludes those within metropolitan districts or contiguous to larger cities, leaving a total of 37 generally comparable to Easton.

stations. Allentown now has three AM stations, two FM stations and one TV station.* This is below the average of broadcasting facilities assigned to comparable cities.

A comparison of broadcasting facilities, excluding the assignment in contest, licensed to Allentown and to Easton as of the date of decision, is as follows: Easton had four broadcasting stations; Allentown, five. Of these Easton had one AM station and Allentown, three; each had two FM radio stations; and Easton had a television station; Allentown had no television.

The radio service available to Allentown from AM radio stations operating in other communities is about comparable or, if anything, slightly less than such radio service available to Easton (R. 191).

The above comparison between Allentown and Easton and between Allentown and the other comparable 20 cities fails to give due credit to Allentown for being the principal city in the Allentown-Bethlehem metropolitan district, population 173,000. A true comparison must take into account the fact that Bethlehem with a population of 66,000 is immediately adjacent to Allentown and yet has only one day-time AM radio station. Bethlehem must look to the Allentown stations for some local service.

The city of Allentown has a population of 107,000 contrasted with Easton's 36,000 population (R. 163). The rate of growth for Allentown is 10.2% and but 6% for Easton. Respondent's station would make service available day-time to 314,000 as contrasted with 212,000 for Easton Company and at night-time the difference is 92,000 for Respondent and 57,000 for Easton Company (R. 182, 185). Assuming a grant of either station the population per-local-AM-station is 27,000 for Allentown and 18,000 for Easton (R. 163, 188, 191).

The above comparison of typical Section 307(b) factors is persuasive in supporting a grant of Respondent's station. These factors, considered most favorably to Easton, do not

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* Not applied for at the date of decision. (R. 191).

compel a grant to it of the contested station. If anything, this case is one in which Section 307(b) factors, if not definitely in favor of Allentown, are at least in balance.

The proposal of two-AM-stations-in-each-community is unprecedented. The court below characterized it as a "gloss" on Section 307(b), without passing upon its merits. There is no indication of any congressional policy favoring the duplication of AM stations in a small community. The proposition as here advanced is traced to one prior decision. *Northwestern Ohio Broadcasting Corp.*, 3 R.R. 1945, aff'd per curiam, *Sky Way Broadcasting Corp.* v. *FCC*, 176 F. 2d 951. As the decision below correctly indicated, the *Northwestern* case is clearly distinguishable from the present situation. The competing applicants for the assignment to Lima or Columbus were accorded a full comparative consideration; the findings disclosed no significant differences between the applicants or their service proposals; no other significant factors were present; and it was not contended that the choice of local AM service was an independently controlling factor (R. 317).*

The proposition of giving an arbitrary preference to a one-AM-station community does not appear in any FCC Annual Report or in any other FCC decision. The rules

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* The only other Commission cases cited by Petitioner as authority for the "choice of local service" doctrine (Brief, p. 41, n. 16) are no more controlling in the present case than the *Northwestern Ohio* decision. In *Lake Huron Broadcasting Corporation*, 6 R.R. 1185, an application for a new broadcast station was granted in preference to the mutually exclusive application for improvement of the facilities of an existing station which was found by the Commission to be fatally defective because of engineering considerations. The Commission noted that "since the application of Lake Huron . . . must be denied for engineering considerations, it is not necessary to make a comparative consideration of it with that of [the other applicant]." Similarly, the Commission's decision in *Vermilion Broadcasting Corporation*, 7 R.R. 602(b) involved a single application for a new station designated for hearing on issues of interference to other stations, and not a full scale comparison of competing applicants for new facilities. Neither of the foregoing decisions was reviewed by the court below.

of the Commission contain no preference to this effect.* The hearing issues specified in the case at bar called for a determination on comparative considerations without any suggestion that Easton was to be given an arbitrary preference by reason of having but one AM station. At the time of the original decision in this case, June 1947, which granted the application of Respondent, Easton did not have a second AM station. No mention was made of any idea of preferring Easton for a second station over the assignment of a third station to Allentown.

The Commission's present insistence on an artificial extension of Section 307(b) to prefer a second station in a community is in striking contrast with its administration at the time of the last Congressional amendment. The existing provision was approved June 5, 1936. It was considered by the Commission in its divided decision of October 20, 1936, *In re Wichita Falls Broadcasting Company*, 3 F.C.C. 386. In this case, the Commission authorized the removal of radio station KGKO from Wichita Falls, Texas, to Fort Worth. This removal deprived Wichita Falls, 44,000 population, of its only radio station and the action was formally protested by public service organizations in Wichita Falls and surrounding communities. Fort Worth then had three stations and received good service from others.

The Commission in its decision of February 2, 1937, *In re Petersburg Broadcasting Company*, 3 F.C.C. 666, allowed station WPHR to move from Petersburg, Virginia, to Richmond, thereby depriving Petersburg, 29,000 population, of its only local radio station. The action resulted in giving Richmond four radio stations.

In *Head-of-the-Lakes Broadcasting Co.* v. *FCC*, 84 F.

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* Such a rule was invalidated in *Storer Broadcasting Co.* v. *U. S.*, — F. 2d —, 11 R.R. 2053 (1955), where the court below held the Commission's "multiple ownership" rule abridged the statutory hearing right by arbitrarily rendering an applicant with interest in 5 VHF television stations ineligible for a sixth, without granting comparative consideration to his application.

2d 396, the court below affirmed a 1934 decision of the Commission permitting radio station KGFK to move from Moorhead, Minnesota, to Duluth over the formal protest of the City of Moorhead and leaving that city with no local radio station.

A more recent decision in this vein was rendered by the Commission in December, 1950, *Atlantic Broadcasting Company*, 6 R.R. 1104. This case involved an application for the removal of station WHOM from Jersey City, New Jersey, to New York City. The initial decision recommended a denial of the application since WHOM was Jersey City's only standard broadcast station and a grant would deprive that community of 300,000 of its only local service, 5 R.R. 512. The Commission reversed its trial examiner, thus permitting the elimination of all local AM service from Jersey City.

The Commission's insistence in this case of giving a second AM station to Easton which presently has four local broadcasting facilities can not be justified in the light of these prior actions under the same statute depriving Wichita Falls, Petersburg, Moorhead and Jersey City of any local AM radio service.

II.

THE COURT BELOW PROPERLY CONCLUDED THAT THE COMMISSION'S DECISION WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE ON VITAL COMPARATIVE CONSIDERATIONS

Where only one of two applications may be granted, the Commission must decide which will better serve the public interest. Such a determination requires a hearing and findings in respect to every difference "except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective," and a final decision based "upon a composite consideration of the findings as to the several differences pro and con each applicant." *Johnston Broad-*

casting Co. v. *F.C.C.*, 175 F.2d 351, 357. The hearing is, of course, an adversary proceeding. *Ibid.*

Where the mutually exclusive applications are for operation in different communities, the determination may become more difficult, for a comparison of the communities must also be made; but it is nonetheless necessary. This was emphasized by the court below in its remand of the first decision "for findings upon the *comparative needs* of the two communities . . . and the *relative abilities* of the applicants to serve the greater need." (*Easton Publishing Co.* v. *F.C.C.*, 175 F.2d 344, 351) (emphasis added). It was apparently recognized by the Commission itself when the applications were designated for a second hearing to determine, *inter alia*, "on a comparative basis the relative ability of [Respondent] on the one hand, or [Easton Company] . . . on the other, to meet the greater need . . ." (R. 58). In accordance with the hearing order and the terms of the remand, both the initial decision and the final decision by the Commission overturning it purported to make a number of comparative evaluations of the applicants—despite the Commission's assertion before this court (Petitioner's Brief, p. 47) that all such comparative considerations became a work of supererogation after the Commission's conclusion that the "choice-of-local-service" doctrine controlled. Whether we consider the Commission's position at time of hearing (that it took account of comparative considerations but found no telling difference between the applicants) or its position before this court (that it did not have to take account of comparative considerations at all), the decision of the agency in either case is equally erroneous. For if the Commission had considered fully and given proper weight to the relevant comparative considerations which the evidence warrants, a preference of the Easton Company over Respondent would be untenable.

A brief summary of the major comparative considerations either ignored or slighted by the Commission, and their significance in this proceeding, is appropriate at this point. Such a summary supports fully the determination

of the court below that a remand is necessary because "there is no substantial evidence in the record as a whole . . . to support the essential underlying conclusion that the ability of the applicants to serve their respective communities was about equal" (R. 317-18).

A. Monopoly and Concentration of Control of Mass Media

The evidence of record in this proceeding demonstrates beyond peradventure that a grant of Easton Company's application would result in significant concentration of control by one organization over the media of communications in the city of Easton and would probably be used to further strengthen the monopolistic position now enjoyed there in the dissemination of news and information by the Easton Company; whereas a grant of respondent's application would just as certainly promote competition in radio services in the city of Allentown.

Easton Company is the owner and publisher of the *Easton Daily Express*, the city's only* newspaper (R. 278). It is the licensee of FM broadcast station WEEX, which has a plant valued at $136,000 (R. 281), and has been in operation since February 1948 (R. 91). In December 1952, six months before the decision here under review, Easton Company was granted an authorization for Easton's only television station, WGLV-TV (R. 165), which has been in operation since June 26, 1953. Thus Easton Company has exclusive local control at the present time of the dissemination of news and information in Easton by press and by television and seeks to augment these holdings by a standard broadcast station. Its only competitor is in the radio field, stations WEST and WEST-FM.

Moreover, the record is eloquent on the manner in which the Easton Company has used its dominant news-gathering

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* Easton Company bought out its only competitor in the newspaper field, the *Easton Free Express*, in 1926 at a cost of $300,000 now carried on its books as goodwill (R. 280, 165). Another competitor, the *Morning Free Press*, began publication in Easton in 1940 but was required to suspend operations in 1943 (R. 170).

and advertising position to suppress competition in the Easton community. It is undisputed that the *Easton Express* for a period of twelve years refused to print the radio program logs of Easton's only radio station, WEST, although at the same time the paper carried the logs of New York City stations (R. 171). This practice was continued by the Easton Company until February 1948, when it became for the first time a licensee of the Commission. The practice was abandoned scarcely one month after the release (January 10, 1948) of the Commission's proposed decision in the *Mansfield Journal** case, which found a newspaper applicant unfit to be a licensee because of certain monopolistic practices it had pursued, including just such a discrimination against the only local radio station as that practiced for years by the *Easton Express*.

In addition to its refusal to carry the program logs of its only local competitor in the field of mass media of communication, the record discloses (R. 171) other instances of abuse of its dominant position in the community by the *Easton Express*:

> "The call letters of WEST have not been mentioned by the paper in connection with some charity campaigns in which the station participated, employees of the stations have not been identified as such in some instances when their name has appeared in the Express, and a newspaper in a neighboring city printed an editorial commenting adversely on certain news-gathering practices of the Easton Express."**

In striking contrast to the concentration of mass media displayed by the Easton Company is the fact that Respond-

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* 3 R.R. 2014(a) (1948), affirmed, *Mansfield Journal* v. *F.C.C.*, 180 F. 2d 28. *See Lorain Journal Co.* v. *United States*, 342 U.S. 143.

** The last mentioned instance above refers to a 1949 editorial published in the *Phillipsburger* in the neighboring city of Phillipsburg, New Jersey, alleging that the Easton Company with regard to public and civic leaders of Phillipsburg followed a policy of "no scoop, no news" (R. 293-294).

ent has no activity in Allentown other than the operation of radio station WHOL, and that there are three other standard broadcast stations in the same community with which Respondent is in active competition.

Even in the absence of any evidence that the Easton Company had utilized the multiple communication facilities it controls in Easton to suppress competition from other sources, the mere fact of its present ownership of a newspaper and two broadcasting facilities in Easton would militate strongly against a grant to it over Respondent. *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 189 F. 2d 677; see *Stahlman* v. *F.C.C.*, 126 F. 2d 124. In the *Scripps-Howard* case, the Commission, in choosing between mutually exclusive applications for a new standard broadcast station at Cleveland, Ohio, decided against the applicant which owned a daily newspaper in that city (one of three), and in favor of the applicant with no other interests in mass communications in the area, even in the absence of any evidence in the record of monopolistic or unfair practices by the newspaper applicant. The court below in affirming the decision stated (189 F. 2d at 683):

> "In considering the public interest the Commission is well within the law when, in choosing between two applications, it attaches significance to the fact that one, in contrast with the other, is dissociated from existing media of mass communication in the area affected . . . This is not to say a permit should be withheld from an applicant because it is otherwise engaged in the dissemination of news . . . But where one applicant is free of association with existing media of communication, and the other is not, the Commission, in the interest of competition and consequent diversity, which as we have seen is a part of the public interest, may let its judgment be influenced favorably toward the applicant whose situation promises to promote diversity."*

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* Cf. *Associated Press* v. *United States*, 326 U.S. 1, 20, where this court agreed that the public interest is served by "the widest possible dissemination of information from diverse and antagonistic sources."

Under the above policy the comparative significance against Easton Company would be great even in the absence of any showing of improper practices. But the record contains undisputed evidence of abuse of its position in the community by the Easton Company to suppress competition from other sources of information. Where a comparison is necessary and a choice possible, any evidence of monopolistic activity by an applicant already enjoying a concentration of mass media in the community involved must weigh heavily against his bid for new facilities.* The great significance of the foregoing factors in the light of Commission and court decisions, independent of all other questions in this case, justify the remand below for an evaluation of the monopoly and concentration of control question which, as the Court below correctly observed, upon re-examination "may well assume a different and perhaps decisive importance." (R. 322).

B. Uncertainty of Program Proposals

In any comparative hearing before the Commission, the applicants have a paramount obligation to make a full and definite disclosure of their intentions as to the nature and quality of the programs which they will broadcast over the requested facilities, for "in a comparative proceeding, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service." *Johnston Broadcasting Co.* v. *F.C.C.*, 175 F. 2d 351, 359. The record before the Commission in this proceeding showed the Easton Company to be in default

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* See *Radio Fort Wayne, Inc.*, 9 R.R. 1221, in which the Commission reversed a trial examiner's report favoring an applicant who controlled a merged newspaper which employed joint advertising rates. The Commission noted that it did "not care to assume the risks attendant upon preferring an applicant involved in practices which, if carried over into the broadcast field, would raise serious public interest question[s]." 9 R.R. at 1222m.

on a major part of its program proposal as a result of unconvincing and conflicting testimony on possible network affiliation, and to have made an unsatisfactory or incomplete showing in other areas of program planning. Even disregarding the examiner's wholly warranted conclusion that the lack of credibility of certain testimony by Easton principals cast doubt on large areas of the evidence adduced, and taking this evidence at face value, the program proposal advanced by Easton is lacking in merit as compared with that advanced by Respondent when judged against the existing radio services and the broadcast needs of the respective communities involved. The trial examiner's report contains three pages of findings comparing Easton Company's proposed service with that now being rendered by Easton's station WEST (R. 105-107). Her conclusions from this evidence are summarized as follows:

> "A comparison of the proposed program service of the Easton applicant with that of Station WEST (paragraph 128 of the findings) discloses that a substantial portion of the local public service programs, such as panel discussions, interviews, broadcasts of church services and other devotional programs, farm programs, Parent-Teachers Association programs, weather reports, service club luncheon speakers, women's programs, veterans programs and news programs proposed by the Easton applicant are very similar to programs already carried by Station WEST." (R. 135-36)

A similar comparison of Respondent's radio service proposal with the existing radio services available from the three other Allentown stations, WSAN, WAEB, and WKAP, is also contained in the initial decision (R. 108-22). This evidence shows that a striking number of public service, educational and religious programs are broadcast exclusively by Respondent's station, WHOL. For example, WHOL is the only station which now furnishes facilities to the Ministers League (R. 117). The evidence demonstrates that respondent's radio service enjoys wide-spread

public support of leading persons in the community (R. 265-277). The trial examiner's report contains detailed evidentiary findings on "local existing service in Allentown from the three other stations" (R. 78-88), but concludes that Respondent "proposes a program service which is geared to the needs and interests of the community it would serve and includes many local programs not otherwise available to the community, . . . Almost 60% of its total broadcast time during the sample week of January 14, 1951 was devoted to programs of a type not being carried simultaneously by any other standard broadcast station in either Allentown or Bethlehem . . . The station has also carried many local public service programs which were not broadcast by any other station in the area at any time."

The foregoing findings indicate the clear superiority of Respondent's radio service proposal, compared with existing radio services in Allentown, over Easton Company's radio service proposal compared with existing radio service in Easton. Their import, however, is dismissed in the Commission's decision with the following curt acknowledgment of Respondent's superiority:

Respondent (WHOL)	Easton Company
"The station carries a wide variety of network programs, and numerous local programs other than those mentioned, including some of a type not carried by other local stations. Many of the station's programs are of a type not being broadcast at the same time by any other local station." (R. 203)	"Many of the local programs proposed to be broadcast by the Easton applicant are similar in a general way to programs now broadcast by Station WEST." (R. 199)

This demonstrated superiority in definiteness and quality of program proposals is an essential element of comparison between rival applicants before the Commission which cannot be slighted or minimized by that agency consistent

with its requirements of a fair hearing on all issues raised by the parties. Commission decisions between competing applicants have frequently turned on a comparison of the program proposals,* and this preference has been upheld on review by the court below.**

The *Plains Radio* case involved a contest between two mutually exclusive applicants for the same radio station assignment at Lubbock, Texas. The applicant favored by the Commission had proposed program service predicated upon a Mutual Broadcasting System affiliation. By the time the case was reviewed by the Commission that network had contracted with another station in Lubbock. This left the major portion of the program evidence of the favored applicant impossible of performance. The court reversed the Commission and with respect to this issue stated (175 F. 2d at 362):

> ". . . that in a comparative determination the relative merits of program proposals are an important, if not vital, feature of measurement in the public interest.
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> * * *
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> "We are not told by any findings what type of program Lubbock proposes, absent the Mutual network affiliation. Moreover, this is a comparative consideration, and the question is not whether the applicant will present a well-rounded program but whether its proposals will better serve the public interest than will those of another applicant. How can a conclusion be reached as to which proposal is better, if the nature of one of them is not known?

The Easton Company on this record failed to meet the burden of proof imposed by statute, Sec. 309(b), and its showing is otherwise deficient within the rule of *Power*

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* *Missouri Broadcasting Corp.*, 3 F.C.C. 349; *Rossmoyne Corp.*, 7 R.R. 117; *Tribune Co.*, 9 R.R. 719.

** *Plains Radio Broadcasting Co.* v. *F.C.C.*, 175 F. 2d 359; see *Kentucky Broadcasting Co.* v. *F.C.C.*, 174 F. 2d 38; *Johnston Broadcasting Co.* v. *F.C.C.*, 175 F. 2d 351.

City Broadcasting Corp. 4 F.C.C. 227, 230 in which the Commission stated:

> "From an analysis of the entire record, we are of the opinion, and so find, that the applicant's plans for operating the proposed station are not sufficient to enable the Commission, with any reasonable degree of definiteness, to ascertain the nature and character of the service which may be expected in the event this application were granted."

C. Past Performance and Representations to the Commission

The Commission has repeatedly held that a high index to the future reliability of applicants for new facilities may be found in the fidelity with which those applicants have adhered to prior representations to the Commission.* In the second hearing in the present proceeding, the radio service to the city of Allentown by WHOL was reviewed critically and in detail without revealing the slightest deviation by Respondent in actual performance from the representations made by it to the Commission at the time of the original application and hearing in 1946. In the case of the Easton Company, however, the record established numerous departures from its 1946 representations to the Commission in the actual program services now being rendered by its FM station, WEEX (R. 89, 95-97). Moreover, as more fully discussed below, the principals of the Easton Company appearing at the second hearing treated their earlier representations to the Commission with what may only be termed indifference. As indicated elsewhere, the examiner found (and the court below agreed) that the Easton Company changed its testimony on its plans for network affiliation between the first and the second hearing, and then impeached its new representation upon cross-examination. An Easton Company witness referred to his applicant's representations to the

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* *Unity Corp.*, 7 R.R. 1302; *Aladdin Radio & Television, Inc.*, 9 R.R. 1; see *KFKB Broadcasting Ass'n* v. *F.R.C.*, 47 F. 2d. 670.

Commission at the first hearing that a Citizens' Advisory Committee would be formed to assist in the planning of programs as "obviously silly" (R. 288). The Easton Company's testimony in the second hearing on other matters was brought into question because of the evasive and uncandid attitude of that applicant's witnesses. This cavalier disregard of earlier representations to the Commission by Easton Company serves to confirm the examiner's reservations, based on her observation of the witnesses before her, as to the sincerity of the representations at the second hearing. In a comparative proceeding the departures from *past* representations by the Easton Company should have counted against it according to Commission and court precedent even in the absence of questions as to credibility.* When these departures from past promises are coupled with evasive and uncandid conduct regarding *future* operations, the comparison to an applicant with no such defects becomes all the more significant. *Cf. F.C.C.* v. *WOKO, Inc.*, 329 U.S. 223.

D. Other Public Interest Considerations

The court below discussed the three areas of comparative consideration above as illustrative of the insufficiency of the evidence on which the Commission's findings rested. These, however, are not the only areas in which the Commission's decision is wanting, for the record indicates at least the following additional significant differences between the two proposals which were not given weight by the agency:

A grant of Easton Company's application would in fact be an addition to its existing FM broadcasting and television plant; whereas, a grant to Respondent would result in an entirely *new* service not otherwise available over any other facility. For example, Respondent's station employs fourteen persons (R. 180); whereas, Easton Company would given employment to only four additional em-

* Note, *supra*, p. 42.

ployees (R. 169). Easton Company's program service would be duplicated over its FM station and the proposed AM station (R. 137). Thus programs which Easton Company proposes to broadcast can now be broadcast over its existing FM and television stations.

Respondent's proposal has the support of testimony of leading civic, educational and religious leaders of Allentown; whereas, no such support is shown for the Easton Company's proposal. Public witnesses testifying for Respondent include Mayor Donald V. Hock, Rabbi Louis M. Youngerman, Rev. Reuben D. Bollmann, Rev. Charles L. Miller, Prof. Wilbur William Hollman, Cedar Crest College, and Rev. Willis D. Mathias, President, Ministers League of Allentown (R. 265-78). In contrast, no financially disinterested public witnesses in Easton testified for the Easton Company with one minor exception. Lawrence L. Mason ostensibly appeared in that capacity as President of Easton Players Guild but it was later developed on cross-examination of another Easton Company witness that Mr. Mason was in the employ of the Easton Company (R. 102, 289). Ralph C. Hutchinson testified as President of Lafayette College which was shown to be a beneficiary of one of the Easton Company trusts (R. 101, 168). C. Hammond Blatchford of Centenary Junior College, Hackettstown, New Jersey, testified but it was established that this city is not within a service area of the proposed Easton Company station and that his College does use the facilities of existing station WEST (R. 100). The only other public witness was William R. Nixon, Chairman, Committee of Music Appreciation Program for Elementary Schools, who testified that the AM station would give expanded "receiver-coverage," that the existing FM station provided a better form of reception and that he had made no efforts to use the services of existing station WEST (R. 102).

The final decision of the Commission here under review considerations outlined in the foregoing paragraphs or is either silent as to the significance of the comparative

dismisses them out of hand as subordinate to the overweening effect of the "choice-of-local-service" doctrine which the Commission seeks to engraft upon Section 307(b) of the Act.

The failure to consider the important public interest questions raised and answered by a consideration of monopoly, program proposals, and applicant reliability before the Commission fully justifies the holding of the court below that the record as a whole contains no substantial evidence to support the only kind of finding which could bring Section 307(b) into play as a crucial factor. A review of the above discussed factors of comparative consideration is sufficient to show fair observance of the substantial evidence rule by the lower court and the presence in this case of no recognized exception. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491; *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502.

III.

THE COMMISSION ACTED ERRONEOUSLY IN REJECTING THE FINDINGS OF ITS TRIAL EXAMINER ON THE LACK OF CREDIBILITY OF TESTIMONIAL EVIDENCE OF EASTON COMPANY WITNESSES

This question concerns the testimony of the two principal witnesses of the Easton Company, the findings of the trial examiner thereon, and the rejection of these findings by the Commission. The witnesses involved are J. L. Stackhouse, the President, Treasurer, and "general manager" of the Easton Company, one of its three directors and a stockholder (1.8%), (R. 167), and Nelson S. Rounsley, an employee of the Easton Company and "general manager" of its radio station activities (R. 89, 170).

A. The Disputed Credibility Evidence and Rulings Thereon

As noted above, evidence on program planning is an essential element in FCC actions on applications for new broadcast stations. The FCC application form, which must be submitted under oath, calls for complete program data in the form of a proposed typical week's schedule with

program type classifications for each quarter hour, including network programs, 1 R.R. 98: 111-114. FCC rules require "full and complete disclosures" (47 CFR 1.305) and reliance is based on an applicant's representations.*

In the case at bar, evidence on program planning was of unique significance since the point of remand was for further findings on program service.** One issue set down by the FCC in its second hearing order called for a determination of the "program service presently being rendered" compared with the service plans proposed by Respondent and Easton (R. 45).

Easton Company's program evidence was given by Mr. Rounsley and his entire testimony was on programming which was further detailed in four exhibits totaling 38 pages.

Exhibit No. 84 of Easton Company entitled "Proposed Program Schedule for Typical Week" listed the programs to be broadcast each quarter hour from 7:00 A.M. to midnight, all given as locally originated, Under "Program Sources" the answer to "network commercial" and "network sustaining" in each case was "NONE". Such detailing of program scheduling necessarily requires a disclosure of intentions as to network affiliation.***

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* An applicant's responses to program questions in FCC forms "constitute a representation of programming policy upon which the Commission will rely in considering the application." 1 R.R. 98:111.

** This is the only case in which two applicants were required to prove the detail of program services, hour-by-hour, day-by-day, being rendered by the existing stations. Such proof has never been required before or since. Program content or character of service are *not* within the context of Sec. 307(b).

*** The intentions of an applicant on the question of network affiliation admits of one of three possibilities. The fact and representations may be that (a) all services will be locally originated, (b) network services will be employed (which may vary from definite commitments to expectations), (c) the applicant is frankly uncertain in which case his direct evidence may be given in the alternative, one schedule based on local programming and the other predicated upon network affiliation. See, *e.g.*, *Aladdin Radio & Television, Inc.*, 9 R.R. 1; *Oregon Television, Inc.*, 9 R.R. 1401; *Petersburg Television Corporation*, 10 R.R. 567.

The Nelson S. Rounsley Testimony. This witness under cross-examination contradicted testimony which he gave under direct examination that network programs were not to be included in the proposed radio service. The precise testimony given was as follows (R. 288):

> Mr. Lovett: "I notice in your analysis of Exhibit No. 84, your proposed program schedule, that you do not include any network programs on your proposed AM schedule."
> Mr. Rounsley: "That is correct."
> Mr. Lovett: "That is your present plan, is it?"
> Mr. Rounsley: "That is the present plan."

The above testimony was reaffirmed upon questioning by public counsel (R. 289):

> Mr. Schildhause: "Mr. Rounsley, you stated, did you not, that you had no current plans to affiliate your proposed AM station with the network?"
> Mr. Rounsley: "That is correct."

The testimony on network affiliation would probably have ended at this point except for a chance remark by the witness later on and on a different subject, religious programs. The witness was asked if it would be a firm policy not to charge for religious programs. The following answer and qualification were given (R. 289-90):

> Mr. Rounsley: "That will be a firm policy. I better qualify that. In the event of any network affiliation, any programs accepted by the network as commercial any religious programs, may or may not be accepted by the stations as commercial."

This was the first indication that the witness had in mind any network affiliation. The witness then passed it off as a "remote possibility". Next, on being pressed by public counsel, the witness further modified his testimony that if a network were offered, it would be considered. At this point the Presiding Officer stated (R. 290):

> "Mr. Rounsley, I am a little confused about this network proposition."

The witness then responded that if the station were granted to the Easton Company it would " . . . explore the possibility of network affiliation". Then the following exchange took place between the Presiding Officer and Mr. Rounsley:

> The Presiding Officer: "Am I to understand you would not wait for somebody to come to you?"
> The Witness: "That is correct. In other words, we would have to have something to affiliate before we talk business."
> The Presiding Officer: "It is still not clear in my mind. Do you plan to sit by and wait for somebody to approach you, or what would be your procedure?"
> The Witness: "I think we would probably see what was available; . . ."

It is impossible, of course, to recreate by any words here in print the scene in the hearing room, the appearance of the witness, the emotions displayed by him, the tone of his voice, or the sum of impressions gleaned from what the trial examiner saw, heard and experienced during the above exchange of questions and answers.* There can be no serious doubt, however, that after his self-impeachment the trial examiner no longer placed credence in the testimony given by this witness. The trial examiner was clearly entitled to regard the testimony of this witness as untrustworthy. The responsibility which long experience vests in one who presides at the taking of evidence entitled the trial examiner to conclude that the Easton Company's real intentions were to seek actively a network affiliation notwithstanding the direct evidence to the contrary that there was no such intention.

The above episode is of two-fold significance. The matter of self-impeachment is significant of itself. Of equal significance is the contradiction or unanswered doubt on the record as to what program service was actually proposed by the Easton Company, thus leaving that applicant in default on its burden of presenting evidence on its pro-

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* The trial examiner on this episode reports ". . . he displayed an attitude of evasiveness and lack of candor . . . " (R. 143).

posal for radio service.* This second aspect has been discussed above.

The J. L. Stackhouse Testimony. This witness, the chief corporate official to testify for the Easton Company, showed a marked capacity for detail and recollection on direct examination and an inconvenient lack of these abilities on cross-examination. The matters in dispute, although not of themselves too significant, did include facts bearing on the dominance of the Easton Company over mass media facilities in Easton. Of perhaps equal significance is the fact that this corporate official gave no testimony on the critical issue of the program plans of the Easton Company nor was he recalled as a witness to correct the contradictions in the testimony given by Mr. Rounsley on the Easton Company's program proposal.

The witness on direct examination testified as to newspapers circulated in the Easton area. The obvious purpose of volunteering this line of testimony was to show some competition to the Easton Daily Express, Easton's only newspaper. The testimony was that daily newspapers published in some five other cities and those published in Philadelphia and New York circulated in the Easton area. The witness also testified that there were some eight weekly publications of surrounding communities circulated in the Easton area. When pressed on cross-examination as to each daily publication, the witness was unable to give any circulation in Easton or in the Easton city zone except the three newspapers published in Bethlehem and Allentown. As to the several weekly publications, the witness first denied having circulation figures. When asked if they were small, he immediately gave the approximate circulation of each (R. 179). However, no circulation was given for Easton. The witness concluded this line of testimony by denying that he had any intention of implying on direct

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* The act provides that the burden of proceeding and the burden of proof upon all issues shall be upon the appellant. Sec. 309(b).

examination that any of the weeklies circulated in Easton (R. 278-284).

This witness was asked by public counsel whether the Easton Company declared a dividend last year (1950). The answer was "yes". An objection by counsel for the Easton Company to a further question on the size of the dividend was overruled. The witness next parried:

"Are you speaking of 1950? You said last year, I believe?" Public counsel repeated the question:

"For the year 1950, what were the dividends?" The witness answered:

"I don't have the figures here."

Again he was asked the size of the dividend per share but answered:

"I don't know that without checking the record."

This testimony was concluded by an exchange between the trial examiner and the witness as follows (R. 285-287):

> The Presiding Officer: "In answer to a question by Commission counsel I understood you to say that you did not know the amount of dividends that were paid, and my only question to you now is, am I correct in assuming that you do not know what dividends you received from the stock which you own in the Easton Publishing Company, last year?"
>
> The Witness: "No; I do know that, I mean my records show it, but I do not know it as of this moment."

This testimony is susceptible of one of two possible interpretations, i.e., (a) the witness did not in fact know the amount of the dividend; or (b) the witness did know this fact. If the witness was untruthful in disclaiming recollection this may have been motivated by one of two causes, i.e., (a) the witness may have considered the amount of the dividend none of the Commission's business, not something to make public, or (b) the witness may have decided to parry the question pending some explanation of his counsel's objection to it. In any event no "post mortem" speculation on the cold record is likely to be more accurate

than the appraisal of the trial examiner, who was clearly unimpressed by the testimony of this witness.

A hearing officer, who lives with a case, has an unique advantage for appraising the probity of oral testimony in the light of associated circumstances. For example, among the four corporate offices held by Mr. Stackhouse was that of Treasurer. He is a 2% stockholder of the corporation, 65% of the stock of which is owned by three trusts (R. 208). It is not likely that the annual dividend record of this 1.7 million dollar publishing and radio enterprise is a matter of indifference to either the three trustees or to Mr. Stackhouse or that his memory would need refreshing on the 1950 dividend distribution, in part to himself, of the net profit in excess of $50,000 for the year (R. 165). As the trial examiner stated, " . . . acts of evasiveness may be more significant than the facts evaded" (R. 145).* The significance of the J. L. Stackhouse testimony in dispute is that there should exist any episode of his testimony or demeanor giving rise to any question as to the trustworthiness of the representations and disclosures to the FCC by Easton Company's chief corporate officer. It is appropriate also that the above testimony in dispute be evaluated by association with other evidentiary circumstances.

It must be conceded that neither J. L. Stackhouse nor Nelson S. Rounsley may be regarded as disinterested witnesses.

Besides interest there is also motivation. Mr. Stackhouse was moved to play down the Easton Company's exclusive position as publisher of Easton's only newspaper, by attempting to show competing circulation from outside publications. Easton Company sought to gain a preferential position in the case by emphasizing locally originated radio programs to the exclusion of network programming. The Commission has expressed itself on this subject as follows (1 R.R. 53:135):

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* See *F.C.C.* v. *WOKO*, 329 U.S. 223, 227.

> "The Commission has always placed a marked emphasis and in some cases perhaps an undue emphasis on the carrying of local live programs as a standard of public interest."

Easton Company in the 1946 hearing unequivocally proposed network programming (R. 21, 61, 89, 90, 103). Preceding the second hearing, Easton Company refused to accede to the Commission's behest that the 1945 applications of the parties be amended and brought up to date. Except for formal corporate changes not material, Easton Company did not amend its pleadings on program service. The effect was to allow it complete freedom to tailor its direct evidence on program service at the second hearing. Easton Company's testimony on direct represented local program service only. No attempt was made to reconcile this with its testimony in the 1946 hearing on network affiliation (R. 103):

> "The program schedule proposed at the 1951 hearing contains no network programs and no mention of the network affiliation question was made on direct examination".

Mr. Rounsley also changed his testimony between 1946 and 1951 on another program subject. His testimony in 1946 was that (R. 21, 90):

> "Applicant has organized a citizens' advisory committee to assist it in developing a well-rounded program service adapted to the needs and desires of the community".

The same witness in his 1951 testimony characterized the 1946 testimony on a citizens' advisory committee as "obviously silly" (R. 288, 105).

The trial examiner's findings contain a detailed comparison between the program service representations made by Easton Company in its proposal for FM radio station WEEX with the actual programs being broadcast by that station in 1951. Numerous differences between the 1946

representations and the actual programming are enumerated in findings 120 and 121 of the Initial Decision (R. 95-98). This is associated with the finding on demeanor evidence as to witness Rounsley that " . . . he displayed an attitude of evasiveness and lack of candor on the subject" (R. 143). These conclusions were related back to the evidentiary findings in par. 126 (R. 102-104).

The Trial Examiner's Findings. The trial examiner concluded that the Easton Company had failed to make "frank, candid and honest disclosures to the Commission" and that its principal witnesses were reluctant and evasive (R. 144). The ground of the trial examiner's recommended denial of the Easton Company's application was that it had defaulted on its burden of making a satisfactory showing of its proposed program service; and, that this testimony was untrustworthy and could not be relied upon with confidence as to the character of radio service which would actually be rendered by the Easton Company (R. 146).

Commission's Ruling on Credibility Evidence. The Commission, on review of the Initial Decision, "rejected" the above stated findings and conclusions of the trial examiner. (R. 214). The reason given by the Commission is "we do not agree." The Commission sought to overcome the force of these findings by an independent evaluation of the *disputed evidence. This was undertaken because (a) of* "the seriousness of the matter" and (b) the hearing officer's judgment as to credibility was not based on the testimony of "different witnesses who make contradictory statements" (R. 205). (This ruling ignored the existence of an issue of credibility based on self-impeachment). The detail of the Commission's independent evaluation is left quite unexplained except that it flatly "rejected the conclusion of the Hearing Examiner" and disagreed "that the applicant has been evasive or uncandid about its network affiliation plans." The trial examiner's findings above stated are solidly supported by substantial evidence and in keeping with permissible demeanor considerations. The Commission arbitrarily ignored these findings. Without

any reasoned judgment, the Commission says "we disagree"—"we reject" (R. 214).

B. The Trial Examiner's Findings on Credibility Were Improperly Rejected

No one would seriously contend at this period in the evolution of administrative law that a trial examiner of an agency should be disabled from making findings on credibility. The question is what effect shall be given to such findings, i.e., by the agency, and on appellate review. Two possible extremes are: (a) the trial examiner's findings on credibility are as unassailable as those of a jury; or, (b) the agency at will may disregard the trial examiner's findings on credibility and substitute its own judgment.

This issue* is one of first impression in the judicial review of radio appeal cases. Also a consideration of the role of the FCC relative to its trial examiners is one of first impression under the McFarland Act, *infra*, which makes the FCC in this matter unique among Federal agencies.

Credibility is a part of the rule of confrontation. From the earliest days, our concept of adjudication has accepted the principal of confrontation, requiring the appearance of witnesses, oral testimony under oath and the right of cross-examination. This was the main difference between the civil-law and the common-law systems on taking evidence. III Wigmore, *Evidence* § 946 (1940 ed.). One purpose of having the witness in person before the tribunal is " . . . so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom". V Wigmore, *Evidence*, § 1399 (1940 ed.). Thus wherever oral testimony is required, "the demeanor of a witness is always assumed to be in evidence". *The William J. Riddle*, 102 F. Supp. 884, 887, (S.D.N.Y. 1952).

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* The credibility issue in this case is independent of the question of monopoly and undue concentration of control over communications media.

The right of confrontation is an essential part of the structure of a hearing since it embraces opportunity for cross-examination and demeanor evidence. In any situation where oral testimony is permitted or required, our hearing process accepts the right of cross-examination and a testing of the credibility of the witness not only by what is said, but also by what is seen and heard. These features are deemed essential for the "taking of evidence".

As between a court and jury, credibility is determined by the jury.* Its findings of fact, with possible exceptions not material here, are characterized as unassailable.

As between a judge and a master, the master's finding of fact are entitled to acceptance unless "clearly erroneous", Rule 53(e)(2), F.R.C.P. But a distinction is made as to findings on *credibility*. The findings of a master on credibility are entitled to even greater weight, variously stated as "great weight", "presumptively correct" and of "controlling weight". In *Ferroline Corp.* v. *General Aniline and Film Corp.*, 207 F. 2d 912, 920 (7th Cir. 1953) the court said:

> "Even where, as here, the oral testimony is largely uncontradicted, the trial court must respect the advantage the master enjoyed when he saw and heard the witnesses and was thus enabled to judge of their veracity and credibility. Santa Cruz Oil Corp. v. Allbright-Nell Co., 7 Cir., 115 F. 2d 604."

In *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279 (7th Cir. 1940) the court, although affirming the district court's modification of the master's findings, acknowledged:

> "Where the question is one of veracity it is clear that the appellate court should give controlling weight to the trier of fact who saw and heard the witnesses. This is well established."

In *General Kintrolar Co.* v. *Allen*, 124 F. 2d 123 (6th Cir. 1941), the district court was reversed on a burden of proof

* 53 Am. Jur. *Trial*, § 181.

ruling for differing with the findings of the master. The court of appeals stated, 124 F. 2d at 124:

> "As to the oral testimony, the master had a superior opportunity to appraise the credibility of the witnesses and to resolve conflicts in their testimony. His findings based thereon are presumptively correct. Commissioners of Sewerage v. Davis, 6 Cir., 88 F. 2d 797, 800."

The "clearly erroneous" doctrine as applied to a master's* finding of fact is the same standard as applied to an appellate court upon review of the findings of fact of the trial judge acting without a jury. Rule 52(a) states, "findings of fact shall not be set aside unless clearly erroneous, * * * ". Additionally, where credibility is involved there is further provided "that due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". It follows that credibility findings predicated upon testimonial evidence are given the same order of finality between the master and the trial court and between a trial court acting without a jury and an appellate court.** *American Tobacco Co.* v. *The Katingo Hadjipetera*, 194 F. 2d 449, cited by the Government, is not in point since the findings rejected on review did not involve credibility findings or "any direct testimony". The opinion in this case recognized the rule of near finality given to a Judge's findings "on facts to which a witness testified orally", 194 F. 2d at 451:

> "We accept, as we must, those of the trial judge's inferences of fact which he drew directly from his

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* Under Rule 53(a) the word "master" is now used to include without distinction "a referee, and auditor, and an examiner."

** 5 Moore's Federal Practice, 2d Ed. 2984: "The problem of reviewing the master's findings of fact is essentially the same as the problem of reviewing the district court's findings of fact when it is the initial trier of the facts . . . Essentially the same distinctions are applied in reviewing the master's findings of fact. Those that are based on oral testimony, where credibility is involved, are entitled to great weight."

> estimates of the credibility of witnesses whom he observed as they testified in his presence—i.e., his inferences (sometimes called "testimonial inferences") that certain facts existed because he believed some witness or witnesses who testified before him that those facts did exist."

The greater finality accorded credibility findings by a trial court as to a master and by an appellate court as to a trial court, was clearly illustrated in *Morris Plan Industrial Bank* v. *Henderson*, 131 F. 2d 975 (2d Cir. 1942), which set aside an order of the district court reversing the findings of the referee. The controversy concerned testimony on the value, if any, of a bankrupt's claim against his brother-in-law and the reason for failing to schedule this asset. The court regarded the case as one involving demeanor evidence "in which the referee's judgment was final". On the question on whether the district court had "larger" latitude in reviewing the referee's findings than that allowed the court of appeals, the opinion states, 131 F. 2d at 976:

> "It is true that logically a distinction can be drawn between holding a referee's finding to be 'clearly erroneous' and holding a judge's finding that a referee's finding is 'clearly erroneous' to be 'clearly erroneous' . . . We should regret, however, to be compelled now to introduce such refinements into the solution of what is after all only a practical problem."

The above cases indicate a long standing recognition of the importance of demeanor evidence and that a judgment on demeanor evidence is an essential responsibility of the trier of facts. The findings of fact whether by a master or by a trial court on credibility evidence are almost conclusive on review in contrast to other findings where there is a greater latitude of rejection. Since demeanor evidence cannot be preserved in a printed record, reason and experience compel that findings thereon by the trier of the facts be accorded great weight. Such restraint is essen-

tial, otherwise the true function of the trial officer will be stultified.

The near finality accorded findings on credibility in judicial proceedings has been applied in almost the same degree to trial examiner's findings on credibility in agency proceedings. The *Universal Camera* case, 340 U.S. 474, 496, recognized that the status of a trial examiner's report before an agency becomes more significant where credibility findings are involved. This significance was given effect on remand by the opinion in *NLRB* v. *Universal Camera Corp.*, 190 F. 2d 429, 430, which stated:

> ". . . on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors, when the words alone leave any rational choice. Perhaps as good a way as any to state the change effected by the amendment is to say that we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."

The words "substantial preponderance in the testimony as recorded" are keyed to credibility findings on demeanor evidence as distinguished from the "substantial evidence doctrine" as applied to findings in general not including credibility. The above opinion by Judge Learned Hand was quoted with approval in the decision here under review (R. 319) on the point of credibility findings. As to other findings not involving demeanor evidence, such as the monopoly issue, the "substantial evidence" rule was applied (R. 317). The effect to be given a trial examiner's findings on credibility was again stated in a later opinion by Judge Learned Hand in *NLRB* v. *James Thompson & Co.*, 208 F. 2d 743, which reversed the agency's decision and reinstated its trial examiner's findings that the employer had acted in good faith in refusing to deal with a union in the belief that it had not obtained a majority representation. The opinion states, 208 F. 2d at 746:

> "Over and over again we have refused to upset findings of an examiner that the Board has affirmed, not

> because we felt satisfied that we should have come out the same way, had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence that words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test."

The past decade of judicial review of agency decisions has shown a consistent trend of upholding the findings of a trial examiner on credibility evidence. In *S. Buchsbaum and Co.* v. *FTC*, 153 F. 2d 85 (Cir. 7th, 1946), which was decided even before passage of the Administrative Procedure Act, the court stated, 153 F. 2d at 87:

> "The Commission contends that what it calls the marked difference between the functions and authority of trial judges and masters on the one hand, and trial examiners on the other, precludes the application of the rule of confrontation in the authorities just referred to. Hence it argues that the finding of examiners being advisory only, there is not present in their findings the principal consideration, that is to say, finality of factual judgment, which requires a trial *de novo* in the event of the death or disability of a judge or master. We think this does not meet petitioner's contention. The elementary principle underlying all trials of whatever nature seems to be that the rule of confrontation shall be applied where the witnesses are available for that purpose. . . . Congress has authorized the appointment of Examiners in such cases and they are the eyes and ears of the Commission. There is no complaint as to this delegated power, but it certainly cannot be said that the appointment would free the Examiner from the duty of observing the demeanor of witnesses, for this would amount to a lack of due process to which petitioner is entitled."

A number of decisions reviewing National Labor Relations Board cases have given effect to trial examiner find-

ings on credibility evidence. *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484 (2d Cir. 1952) is a case in which the court upheld the agency's order and this affirmance was in a large measure predicated upon the trial examiner's findings on demeanor evidence. The opinion states, 201 F. 2d at 487-88:

> "If, in similar circumstances, a trial judge made such a finding, we would be obliged to accept it. For the pivotal factor here is the Examiner's disbelief in Holland's testimony, a disbelief that rested on an evaluation of Holland's credibility, which in turn the Examiner founded upon 'his observation of the witnesses.' Repeatedly, the courts have said that, since observation of such 'demeanor evidence' is open to a trier of the facts when witnesses testify orally in his presence, and since such observation is not open to a reviewing tribunal, that fact-trier's findings, to the extent that they comprise direct or 'testimontial' inferences, are ordinarily unreviewable. True, demeanor evidence may sometimes mislead; but our courts regard it nevertheless as an excellent clue to the trustworthiness of testimony.
>
> * * *
>
> "The result of the stress on demeanor is to confer immense discretion on those who, in finding facts, rely on oral testimony. But few doubt that the risk involved is, on the whole, well worthwhile."

In a recent decision, *Boeing Airplane Co.* v. *NLRB*, 217 F. 2d 369 (9th Cir. 1955), the agency was reversed on numerous grounds, in most instances for rejecting credibility findings of the trial examiner. In this case the Board discredited testimony which the trial examiner believed and in other instances credited testimony which the trial examiner had disbelieved. The opinion of the court states, 217 F. 2d at 373:

> "The Court has made a careful review of the long record and of the Intermediate Report in the light of the extensive briefs filed here. The Court has only the

highest praise for the careful and discriminating work of the Trial Examiner. His approach was judicial and his judgment exact. The Board should have accepted his findings without additions, exceptions or modifications. He alone saw the witnesses, and his opportunity to appraise the general situation, the feeling of management and employees, together with the imponderables, cannot be paralleled by either this Court or the Board. This Court affirms the findings of the Intermediate Report in their entirety."

Another significant recent decision on examiner credibility findings, not cited in the Government's brief, is *Gamble-Skogmo* v. *FTC*, 211 F. 2d 106 (8th Cir. 1954) which set aside a decision by that agency on the ground that full effect was not given to testimonial evidence at the trial examiner level. In this case, the trial examiner retired before concluding the trial, which was resumed before another trial examiner. The court said that it was a reversible error to substitute a second trial examiner where testimonial evidence was involved before the first trial examiner. The court held that a trial examiner's judgment on credibility of testimony is a functional part of the decisional process and that credibility evaluation can be made only by the trial examiner who had presided at the reception of the evidence. The opinion states, 211 F. 2d at 113:

"In legal concept, appearance and demeanor on the part of orally-testifying witnesses and permeating trial atmosphere to which these incidents may give rise are, in such situations, 'assumed to be in evidence.' Wigmore on Evidence, 3rd ed., § 946. And such an evaluation of credibility, therefore, in relation to oral conflicting testimony, on material matters, necessarily is of the nature and stature of any rationalized conclusion constituting a part of a judicial or quasi-judicial result.

The agency appeal decisions above cited give deference

to credibility findings of a trial examiner essentially comparable to that given a master or a trial judge. Any other rule would eliminate demeanor evidence from agency case proceedings.

The above cases pertain only to credibility findings and, for this reason, are to be distinguished from *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952). *Minneapolis-Honeywell* held that the trial examiner's findings out-weighed the facts relied upon by the FTC in reaching an opposite result, and that their rejection by the Commission was therefore arbitrary. This decision did not turn on findings on credibility, and consequently, is not here in point.

Full application of the rule of confrontation at the trial examiner level does not impinge upon proper policy functions of the agency. *Credibility can only deal with a question of fact.* One of the most significant observations contained in the Benjamin Report on *Administrative Adjudication in New York* (1942) is the following:

> *"The Place of Policy in Administrative Adjudication"*
>
> * * *
>
> "But policy should play no part in the decision of questions of fact; policy, rightly understood, cannot call for the decision of a question of fact in a particular way."

The FCC procedural rule on hearings, 47 CFR 1.871, provides:

> "§ 1.871 Rules of evidence.—Except as otherwise provided herein, *the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings.* Such rules may be relaxed if the ends of justice will be better served by so doing." (Emphasis added)

This clearly embraces demeanor evidence at the trial examiner level, and the Commission has often recognized the fact, most recently in the case of *Radio Associates*, 10 R.R. 1118a, 1118g. This case after initial decision which involved credibility findings was remanded by the Commission to a second trial examiner with the following instruction:

> ". . . the Examiner should bear in mind, particularly where demeanor or conflicts of testimony are shown to be involved, that it is his predecessor who has heard the witness."

C. McFARLAND ACT CHANGES IN FCC DECISIONAL PROCESSES AND ORGANIZATION

The McFarland Act, 66 Stat. 711, which was approved July 16, 1952, twelve months prior to the decision in this case, made far-reaching changes in the decisional process and internal organization of the Commission for the trial and decision of hearing cases. In passing this legislation, Congress found the Administrative Procedure Act inadequate for FCC case proceedings.*

Any consideration of the role of the FCC *vis-a-vis* its trial examiners or the status of their credibility findings must take into account the 1952 revisions in the FCC's hearing structure.**

The McFarland Act was the " . . . end product of more than a decade of congressional investigations, studies, hearings, and reports by committees in both Houses of Congress." *H. Rep. No. 1750; Conf. Rep. No. 2426*, 82nd Cong., 2d Sess. Most of these changes were enacted by Congress after extended hearings and "lengthy testimony

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* See 23 Univ. of Cin. L.R. (Fall 1954) 469, "A Study of the Significant Departures From the Administrative Procedure Act as Found in the 1952 Amendments to the Communications Act of 1934".

** Communications Act Amendments, 1952, Secs. 4(f)(2); 5(c), (e); 309(b), (c); 402(g), (h); 409(a), (b), (c) and (d).

presented by the Federal Communications Commission . . . opposing many of the provisions contained in these bills." (H. Rep. 1750, p. 2).

The more significant differences between the McFarland Act and the Administrative Procedure Act pertain to (a) trial examiner hearings, (b) FCC review of initial decision, (c) separation of functions and (d) right of parties to a hearing. The following is an outline of these categories as relevant to the role of FCC trial examiners.

(a) Trial Examiner Hearings

(1) Prior to the McFarland Act, FCC trial examiners were forbidden to conduct hearings which involved a "change of policy." *

(2) New Sec. 409(a) requires that *all* hearings, unless held by the Commission *en banc* must be conducted by a trial examiner.**

(3) Authority for the conduct of hearings by a single commissioner or by a panel of commissioners was repealed.

(4) Consultations between trial examiners and staff personnel were prohibited and extended to forbid con-

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* Sec. 409(a), Communications Act of 1934, 48 Stat. 1096.

** H. Rep. No. 1750 on S. 658, 82 Cong. 2d S., pp. 18-20:

Subsection (a), as modified, provides that in every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, the hearing shall be conducted either by the Commission or by one or more examiners provided for by section 11 of the Administrative Procedure Act. That act, in section 2, defines "adjudication" as agency process for the formulation of an order; and it defines "order" to mean the final disposition (whether affirmative, negative, injunction, or declaratory in form) of an agency in any matter other than rule making but including licensing. The principal result of this modification of subsection (a) is that an individual member, or a panel of members, of the Commission or a board of employees (except examiners above referred to), could not, as is permissible at present, conduct the hearing in any such case of adjudication. Speaking broadly, cases of "adjudication" are those in which quasi-judicial functions, as distinguished from rule-making functions, are being exercised.

sultations between the Commission or members of the Commission and trial examiners.*

(5) The McFarland Act requires that the Report of the trial examiner must be an "initial decision", which, in the absence of exceptions and review by the Commission, becomes the final decision of the Commission.**

The import of the above revisions was to make the FCC trial examiner, by statutory mandate, the trier of facts in FCC hearing cases. The trial examiner was further isolated from any *ex parte* presentation and from consultation with any agency personnel including commissioners. The Congressional intent was to further assure that the examiner conducting the hearing would reach his "decision in an impartial and judicial manner, on the basis of the record made at the public hearing."

(b) Review of Initial Decision

(1) The Commission is required by new subsection (b) to permit the filing of exceptions to initial decision,

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* Ibid:

Subsection (c) contains three paragraphs, applying with respect to cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing by the Commission.

Paragraph (1) contains provisions intended to insure that an examiner (or examiners) conducting the hearing will reach his (or their) decision in an impartial and judicial manner, on the basis of the record made at the public hearing. Toward this end paragraph (1) contains three requirements: First, no examiner shall (except to the extent required for the disposition of ex parte matters as authorized by law) consult any person (except another examiner participating in the conduct of such hearing) on any fact or question of law in issue, unless upon notice and opportunity for all parties to participate. Secondly, no examiner shall be responsible to or subject to the supervision or direction of any person engaged in the performance of investigative, prosecutory, or other functions for the Commission or any other agency of the Government. Third, no examiner may advise or consult with any commissioner or any member or employee of the Commission (except another examiner participating in the conduct of the hearing) with respect to the initial decision in the case or with respect to exceptions taken to the findings, rulings, or recommendations made in such cases.

** Ibid:

Subsection (b) requires, in case of hearings to which subsection (a) applies, the preparation and filing of an initial decision; directs the Commission to permit the filing of exceptions thereto by any party, and to hear oral arguments on such exceptions before the entry of any final decision, order, or requirement; and prescribes what shall be included in decisions.

to hear oral argument and enter a final decision thereon.

(2) The Commission in case proceedings is prohibited from receiving any presentations off the record from staff bureaus and offices including general counsel, chief engineer, chief accountant, etc.

(3) The FCC decision is required to include a determination upon all material issues of fact, law or discretion presented on the record.

The above changes are and were intended to be more restrictive than those in the Administrative Procedure Act.* The effect was to make the Commission (except where it holds *en banc* hearings) a reviewing body of initial decisions in trial examiner hearings. This statutory arrangement conforms substantially with the *de facto* situation. For example, during calendar year 1954, the FCC's trial examiners entered 72 initial decisions in broadcast cases and a total of 95 initial decisions. The FCC during calendar year 1954 entered only 10 contested decisions on review of trial examiner reports. The Commission itself has not sat *en banc* for the taking of evidence in any case of adjudication since 1946.

(c) Separation of Functions

The decisional processes of the Commission are restricted by the McFarland Act to the following:

(1) Trial examiners.

(2) The statutory review staff, Sec. 5(c).

(3) Members of the Commission.

(4) Confidential assistants to each Commissioner, Sec. 4(f)(2).

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* Ibid:

The provisions of subsections (a), (b), and (c), above described, to some extent contain requirements which are already imposed by the Administrative Procedure Act or under the Commission's own procedural rules. However, in certain respects these subsections contain requirements which are more restrictive than those in the Administrative Procedure Act, and in some cases there is a conflict.

The statute provides that the "review staff" shall be directly responsible to the Commission and shall perform no duties or functions other than in cases of adjudication. Conversely, the Commission may not permit other employees to perform review staff functions. Further, staff and bureau personnel are precluded from participating in hearing cases except as a witness or counsel in public. By these provisions the Commission's organization for case proceedings has been carefully compartmentalized far beyond and above that permissible under Sec. 5(c) of the Administrative Procedure Act, 5 U.S.C. § 1004(c).

(d) Rights of Parties to a Hearing

The McFarland Act enlarged the rights of applicants and of interested persons to a full hearing and to a decision on the record as follows (Sec. 309(b)):

(1) The FCC may not administratively deny an application but is required to notify the applicant of grounds, objections and sources.

(2) The FCC is required to notify "all other known parties in interest."

(3) The applicant must be accorded opportunity to reply, and a hearing, if ordered, is predicated on issues in FCC notice and applicant's reply.

(4) Upon issuing order, FCC is required to notify all parties in interest specifying grounds and reasons for hearing.

(5) Other interested parties, not notified, are given status of a party by intervention.

(6) The hearing is required to be a "full hearing" in which applicant and all interested parties shall be permitted to participate.

(7) A decision is required on the evidence of record on all material issues, and by the decisional processes and organization above outlined.

(8) If reversed on appeal, a further FCC decision must be on the basis of the existing hearing record, unless otherwise permitted by the reviewing court.

The above outline applies to hearings initiated by the Commission.

New Sec. 309(c) additionally permits any party in interest to protest a non-hearing grant by the Commission. A protest requires that the Commission's action be set aside pending hearing on the issues specified in the protest and additional issues, if any, specified by the Commission.

The above outline shows a clear intention of Congress to fortify the rights of interested persons to a full hearing in radio case proceedings, even substantially beyond that recognized prior to the McFarland Act in the *NBC Case*, 319 U.S. 239, and the *Ashbacker Case*, 326 U.S. 327.

The scope and effect of the McFarland Act are such that the Congressional policies therein expressed for the handling of radio case proceedings should be given full effect. See *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498. Those intentions clearly affirming a full hearing for the taking of evidence and a determination upon all issues together with the enlarged responsibilities placed upon FCC trial examiners and their reports do not permit the FCC's arbitrary rejection of demeanor evidence in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in this case should be affirmed.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS

(Emphasis added in each case)

I

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001 et seq.

Sec. 5(c), Sec. 1004(c):

> "*Authority and functions of officers and employees.* "The same officers who preside at *the reception of evidence* pursuant to section 1006 of this title shall make the recommended decision or *initial decision required by section 1007* . . ."

Sec. 7(c), Sec. 1006(c):

> "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and *no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense* by oral or documentary evidence, to submit rebuttal evidence, *and to conduct such cross-examination as may be required for a full and true disclosure of the facts.*"

Sec. 8(a), Sec. 1007(a):

> "In cases in which the agency has not presided at the reception of the evidence, the officer who presided . . . shall initially decide the case . . . Whenever such officers make the initial decision and *in the absence of either an appeal to the agency* or review upon motion of the agency within time provided by rule, *such decision shall without further proceedings then become the decision of the agency.*"

Sec. 8(b), Sec. 1007(b):

". . . All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; . . ."

Sec. 10(c), Sec. 1009(c):

"Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action . . ."

Sec. 10(e), Sec. 1009(e):

"*Scope of Review.*

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

II

Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 et seq., as Amended by Communications Act Amendments, 1952, 66 Stat. 711

Sec. 5(c), Sec. 155(c):

"*Review staff; composition; responsibility, duties.*
"The Commission shall establish a special staff of employees, hereinafter in this chapter referred to as the 'review staff,' which shall consist of such legal, engineering, accounting, and other personnel as the Commission deems necessary. The review staff shall be directly responsible to the Commission and shall not be made a part of any bureau or divisional organization of the Commission. Its work shall not be supervised or directed by any employee of the Commission other than a member of the review staff whom the Commission may designate as the head of such staff. The review staff shall perform no duties or functions other than to assist the Commission, in cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing, by preparing a summary of the evidence presented at any such hearing, by preparing, after an initial decision but prior to oral argument, a compilation of the facts material to the exceptions and replies thereto filed by the parties, and by preparing for the Commission or any member or members thereof, without recommendations and in accordance with specific directions from the Commission or such member or members, memoranda, opinions, decisions, and orders. The Commission shall not permit any employee who is not a member of the review staff to perform the duties and functions which are to be performed by the review staff; but this shall not be construed to limit the duties and functions which any assistant or secretary appointed pursuant to section 154(f)(2) of this title may perform for the commissioner by whom he was appointed."

Sec. 308(b):

"All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the

Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; . . . Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

Sec. 309(a) and (b):

"*Examination, action by Commission.*

"If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

"*Notification of denial; contents; reply; hearing intervention.*

"If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding . . . *Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.*"

Sec. 409(a), (b), (c), (d):

"*Hearings—Assignment to examiners.*

(a) "In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, *the hearing shall be conducted by the Commission or by*

one or more examiners provided for in section 1010 of Title 5, designated by the Commission.

"*Initial decision; exceptions; record.*

(b) "*The officer or officers conducting a hearing* to which subsection (a) of this section applies *shall prepare and file an initial decision*, except where the hearing officer becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision. In all such cases the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order, or requirement. *All decisions, including the initial decision, shall become a part of the record and shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order, or requirement.*

"*Performance by examiners; restrictions on all interested personnel.*

(c) "(1) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no examiner conducting or participating in the conduct of such hearing shall, except to the extent required for the disposition of ex parte matters as authorized by law, consult any person (except another examiner participating in the conduct of such hearing) on any fact or question of law in issue, unless upon notice and opportunity for all parties to participate. In the performance of his duties, no such examiner shall be responsible to or subject to the supervision or direction of any person engaged in the performance of investigative, prosecutory, or other functions for the Commission or any other agency of the Government. No examiner conducting or participating in the conduct of any such hearing shall advise or consult with the Commission or any member or employee of the Com-

mission (except another examiner participating in the conduct of such hearing) with respect to the initial decision in the case or with respect to exceptions taken to the findings, ruling, or recommendations made in such case.

"(2) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case before an examiner or examiners or the Commission, and no member of the Office of the General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate.

"(3) No person or persons engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court in any case arising under this Act, shall advise, consult, or participate in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, except as a witness or counsel in public proceedings.

"*Applicability of Administrative Procedure Act.*

(d) "To the extent that the foregoing provisions of this section are in conflict with provisions of the Administrative Procedure Act, such provisions of this section shall be held to supersede and modify the provisions of that Act."

Sec. 19, *Communication Act Amendments, 1952*, 66 Stat. 722:

"This Act shall take effect on the date of its enactment, but—

"(1) Insofar as the amendments made by this Act to the Communications Act of 1934 provide for procedural changes, requirements imposed by such changes shall not be mandatory as to any agency proceeding

(as defined in the Administrative Procedure Act) with respect to which hearings have been commenced prior to the date of enactment of this Act.

"(2) The amendments made by this Act to section 402 of the Communications Act of 1934 (relating to judicial review of orders and decisions of the Commission) shall not apply with respect to any action or appeal which is pending before any court on the date of enactment of this Act."*

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* FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

Public Notice—July 17, 1952
FCC 52-759—77901

CHANGES IN FEDERAL COMMUNICATIONS COMMISSION PROCEDURES PURSUANT TO THE COMMUNICATIONS ACT AMENDMENTS, 1952

On July 16, 1952, the President signed the Communications Act Amendments, 1952, an Act which amends the Communications Act of 1934, as amended, and which contains several provisions requiring changes in existing Commission procedures. The Commission wishes to notify all interested persons that, to the extent that its Rules and Regulations are inconsistent with the requirements of the new Act, the Rules and Regulations will be considered to be superseded thereby. Amendments to the Commission's Rules and Regulations, to bring them into full conformity with the Communications Act Amendments, 1952, will be issued as soon as practicable.

APPENDIX B

DISTRIBUTION OF BROADCAST STATIONS COMMUNITIES COMPARABLE TO EASTON

In 1939 the Commission submitted to Congress in its annual report a list of 133 cities in the United States having a population in excess of 25,000 inhabitants (1930 U. S. Census) *with no radio station.** Thirty-seven of these cities listed below were not located in any metropolitan district or contiguous to a larger city which did have local broadcast service. According to the latest published

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* FCC Annual Report, 1939, pp. 205-6.

reports,* these 37 cities at the present time (1955) are assigned local AM, FM and TV broadcast facilities as indicated in the following tabulation:

State	City	AM	FM	TV	1950 Population
California	Riverside	1	0	0	46,764
Connecticut	Torrington	2	0	0	27,820
Illinois	Aurora	1	0	0	50,576
	Elgin	1	0	0	44,223
	Waukegan	1	0	0	38,946
Indiana	Kokomo	1	0	0	38,672
	Michigan City	1	0	0	28,395
Iowa	Burlington	1	0	0	30,613
	Clinton	1	1	0	30,379
	Ottumwa	2	0	0	33,631
	Waterloo	3	0	1	65,198
Maine	Lewiston	2	1	1	40,974
Massachusetts	Fitchburg	2	0	0	42,691
	Taunton	1	0	0	40,109
Michigan	Ann Arbor	2	0	1	48,251
	Highland Park	0	0	0	46,393
New Hampshire	Concord	1	0	0	27,988
	Nashua	1	1	0	34,669
New York	Amsterdam	1	0	0	32,240
	Kingston	1	0	1	28,817
	Poughkeepsie	2	0	0	41,023
	Watertown	2	1	1	34,350
Ohio	Elyria	1	1	1	30,307
	Hamilton	1	1	0	57,951
	Lorain	0	0	0	51,202
	Mansfield	1	0	0	43,564
	Marion	1	1	0	33,817
	Middletown	1	0	0	33,695
	Newark	1	1	0	34,275
	Springfield	3	0	0	78,508
	Steubenville	1	1	1	35,872
Pennsylvania	Lebanon	1	1	1	28,156
Tennessee	Johnson City	2	1	1	27,864
Texas	Wichita Falls	1	0	1	68,042
Virginia	Petersburg	1	0	0	35,054
Wisconsin	Appleton	2	0	0	34,010
	Oshkosh	1	0	0	41,084
Total	37	48	11	10	

The above tabulation shows that as of the present time the 37 cities listed, all generally comparable to Easton in size, population, and remoteness from any large metropolitan area, have an average of only 1.3 local radio services available, and that less than one out of three has FM or TV local service. In contrast, Easton now has *four*

* *Broadcasting, Telecasting Yearbook* 1955; *Television Factbook*, Spring 1955 Ed.

local radio services, one AM station, two FM stations, and one TV station.

APPENDIX C

DISTRIBUTION OF BROADCAST FACILITIES COMMUNITIES COMPARABLE TO ALLENTOWN

The 1950 U. S. Census Reports list 20 cities in the same general population bracket (100,000-125,000) as Allentown, Pennsylvania, exclusive of cities which form part of larger metropolitan areas (e.g., Camden, Cambridge, and Berkley). The following tabulation* shows the AM, FM and TV service presently available to each of these 20 cities:

State	City	AM	FM	TV	1950 Population
Alabama	Montgomery	6	0	2	106,525
Arkansas	Little Rock	6	6	2	102,213
California	San Jose	4	1	0	162,148
Connecticut	Waterbury	3	0	1	104,477
Delaware	Wilmington	4	1	1	110,356
Florida	Tampa	5	2	1	124,681
Georgia	Savannah	6	2	1	119,638
Illinois	Peoria	5	1	2	111,856
	Rockford	2	1	2	105,438
Indiana	South Bend	3	0	1	115,911
Louisiana	Baton Rouge	5	3	2	125,629
Mass.	Fall River	2	0	0	111,963
	New Bedford	2	2	0	109,189
Minnesota	Duluth	2	0	1	104,511
New York	Utica	3	1	1	101,531
Ohio	Canton	3	1	0	116,912
Pennsylvania	Reading	3	0	2	109,320
	Scranton	5	2	3	125,536
Tennessee	Knoxville	6	1	2	124,769
Texas	Corpus Christi	6	1	1	108,287
	Total	81	19	26	

The above tabulation shows that, in 20 cities comparable in size to Allentown, there are presently available an average of 4.1 AM, .95 FM, and 1.3 TV services, not counting other services received from different cities. Allentown, with 3 AM, 2 FM and 1 TV local service, thus is below the national average for both AM and TV local service.

* Source: *Broadcasting Telecasting Yearbook*, 1955; *Television Factbook*, Spring 1955 Ed.

MOTION FILED FEB 4 1955 LIBRARY SUPREME COURT, U.S.

No. 451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner

v.

ALLENTOWN BROADCASTING CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF EASTON PUBLISHING COMPANY

and

AMICUS CURIAE BRIEF OF EASTON PUBLISHING COMPANY

ELIOT C. LOVETT
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Washington 5, D. C.

February 4, 1955

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF EASTON PUBLISHING COMPANY

The Easton Publishing Company is vitally interested in the outcome of this proceeding because the majority decision of the United States Court of Appeals for the District of Columbia Circuit here to be reviewed reversed a decision and order of the Federal Communications Commission which granted the Easton Publishing Company's application for broadcasting facilities in Easton, Pennsylvania, and denied a conflicting application of respondent, Allentown Broadcasting Corporation, for identical facilities in Allentown, Pennsylvania. Therefore, the propriety of the

grant of the Easton application may be finally determined as a result of this review.*

The Solicitor General, on behalf of the petitioner, has given his consent to the filing of an amicus curiae brief by the Easton Publishing Company, but the Allentown Broadcasting Corporation has refused consent. Hence this motion.

There is one question of law which was not presented by the Federal Communications Commission below and which, as evidenced by the Petition for a Writ of Certiorari herein, apparently will not be presented to this Court, but which it is believed is not only relevant but important because it is founded upon an opinion of this Court which was disregarded by the lower court. The opinion in question is that in *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U. S. 470, where, inter alia, it was stated, in effect, that Congress intended to make broadcasting a competitive business—a mandate to which the Commission's decision herein gives effect, but which the majority decision of the lower court would circumvent.

WHEREFORE, leave is requested to file the accompanying amicus curiae brief of the Easton Publishing Company.

Respectfully submitted,

ELIOT C. LOVETT
Attorney for Easton Publishing Company
729 Fifteenth Street, N.W.
Washington 5, D. C.

February 4, 1955

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* The Easton Publishing Company was an intervener in the first of the two consolidated appeals before the lower court. The Company, inadvertently, did not intervene in the second appeal. However, it filed a brief and participated in the oral argument. The first appeal was dismissed as premature at the same time that the second appeal was decided favorably to the appellant, Allentown Broadcasting Corporation, respondent herein.

IN THE

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FEDERAL COMMUNICATIONS COMMISSION,
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AMICUS CURIAE BRIEF OF EASTON PUBLISHING COMPANY

INTEREST OF THE EASTON PUBLISHING COMPANY

The interest of the Easton Publishing Company, hereinafter often called Easton, in this proceeding lies in the fact that the majority decision of the lower court here to be reviewed would reverse the decision and order of the Federal Communications Commission granting Easton's application for broadcast facilities.

ARGUMENT

This proceeding before the Federal Communications Commission required a choice to be made between two conflicting applicants, Allentown Broadcasting Corporation and Easton Publishing Company, for identical standard broadcast facilities, one to operate in Allentown and the other in Easton, Pennsylvania. Therefore, the primary consideration was necessarily the requirement of Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. 307(b), that broadcast facilities be so distributed "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." *

The first (1947) decision of the Commission was in favor of Allentown (Record, p. 18), but the Court of Appeals could not tell from the findings what caused the Commission to hold that the need of the Allentown community for additional radio facilities was greater than that of Easton and so remanded the case for "findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need." *Easton Publishing Company v. Federal Communications Commission*, 85 U. S. App. D. C. 33, 40. In its opinion the lower court referred to the decision of this Court in *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, and stated (85 U. S. App. D. C. at 35) that this Court had there "made clear . . . that Congress intended to make broadcasting a competitive business". The lower court then continued:

> " . . . It [the Supreme Court] said (309 U. S. at 475): 'In short, the broadcasting field is open to any-

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* Section 307(b) provides, in full, as follows:

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

> one, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.' Under that view of the statute, the public interest, convenience and necessity to which the Act refers are served by *effective competition among strong competitors. Competition, of course, is between broadcasters on different frequencies covering the same area. . . .*" (Emphasis supplied.)

After the remand of the case the Commission held a further hearing and then found that Easton was in greater need than Allentown for new radio service. (R. 211.) *A fortiori*, the Easton Publishing Company was found to be the better able to serve the greater need because it alone proposed primarily to serve Easton, and so the Commission granted Easton's application. (R. 214.) The factor which the Commission considered decisive in requiring the conclusion that Easton had the greater need was the importance of a *choice between locally-originated programs.* Easton had and has only one standard broadcast station whereas Allentown had and has several. (R. 211-212.) Therefore, only by the establishment of another such station in Easton could such a choice be made possible.

This conclusion of the Commission was also in conformity with the need for competition which this Court recognized in the *Sanders* case, supra, as expressing the Congressional intention and which the lower court, in its first decision, also considered important. Significantly, the *Sanders* case involved the communities of Dubuque, Iowa, and East Dubuque, Illinois. Station WKBB was the only broadcast facility in East Dubuque and the Telegraph Herald was the only local daily non-sectarian newspaper in Dubuque. The Telegraph Herald was seeking a new broadcast facility in Dubuque, while WKBB desired to move from East Dubuque across the river to Dubuque. Station WKBB intervened in the Telegraph Herald case upon the contention that there was not sufficient business in Dubuque to support

two stations. The applications were heard in a consolidated proceeding. The examiner who heard the case recommended the grant of the WKBB application and the denial of that of the Telegraph Herald although they were not mutually exclusive insofar as electrical interference was concerned. However, the Commission held that both applications should be granted. On appeal by Sanders Bros. (WKBB) the lower court reversed the Commission, holding that one of the issues that should have been tried was that of alleged economic injury to WKBB. *Sanders Bros. Radio Station v. F. C. C.*, 106 F. 2d 321.

This Court reversed the lower court and held that economic injury is not by itself an element that the Commission must weigh and as to which it must make findings. The Court then stated, as above noted, that "the broadcasting field is open to anyone" provided that there is an available frequency and he "shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." This Court went on to observe that—

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

Thus there were allowed to be established in Dubuque, as the result of the decision of this Court, two radio stations, one owned by the only local non-sectarian daily newspaper. This brought about competition between stations broadcasting on different frequencies and covering substantially the same area.

In the case at bar the Easton Publishing Company is seeking to establish a local broadcast station to operate in competition with WEST, the only other station there. WEST is not a party to the proceeding; it claims no threat-

ened economic injury. The conflicting application of respondent seeks to establish a fourth station in Allentown (a fifth in the Allentown community, including adjacent Bethlehem). (R. 211-212.) The Commission found both applicants to be legally, financially, and technically qualified (R. 209); that is, to use the language of this Court in the *Sanders* case, each had shown "his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

In Allentown there is already a choice of local standard broadcast programs provided by stations that are in competition with each other. In Easton there is no choice of local broadcast programs, and WEST has been without competition from another local standard broadcast station since its establishment. Only by making available a choice between local programs and stations can competition between such stations be achieved. Only by a grant of the Easton application, as ordered by the Commission, may such choice and competition be realized.

CONCLUSION

THEREFORE, inasmuch as the Commission has complied with all statutory and judicial requirements, and as there has been no showing that its findings and conclusions were arbitrary, capricious, or otherwise improper, the decision of the lower court reversing and remanding the case was erroneous and should itself be reversed.

Respectfully submitted,

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